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ENCYCLOPÆDIA
OF THE
LAWS OF ENGLAND
—
VOLUME IX

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ENCYCLOPÆDIA
OF THE
LAWS OF ENGLAND
BEING A
NEW ABRIDGMENT
BY THE
MOST EMINENT LEGAL AUTHORITIES

UNDER THE GENERAL EDITORSHIP OF
A. WOOD RENTON, M.A., LL.B.
OF GRAY'S INN, AND OF THE OXFORD CIRCUIT, BARRISTER-AT-LAW

VOLUME IX
MORTMAIN TO PEEL ACTS

LONDON
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The Articles in this Volume have been
Revised by their respective Authors as at
15th June 1898.

ERRATUM.

In vol. vii. p. 383, line 4 from foot of page, for "SIR JOHN NICHOLL" read "DR. JOHN NICHOLL."

ADDENDUM.

In vol. vi. insert in List of Authors : *Images in Churches*.—T. R. BRIDGWATER.



THE AUTHORS OF THE PRINCIPAL ARTICLES IN THIS VOLUME
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Peace, Clerk of.—W. F. CRAIES.

Pedigree, Proof of.—J. G. PEASE.

ENCYCLOPÆDIA

OF

THE LAWS OF ENGLAND

Mortmain.—The alienation of lands to corporations was looked upon as of great detriment to the Crown and the lord, if any, of whom such land was held. By such alienation the lord was deprived of the valuable incidents of tenure (*e.g.* escheat, wardships, etc.) to which, had the land been held by a private individual, he would have been entitled. Accordingly, from the time of Edward I. we find the Legislature providing against this class of alienation. Alienation in mortmain (*i.e.* whereby the land remained *in mortuâ manu*) in the strict and only proper sense of the term refers only to alienation to corporations, and has nothing to do with alienation to charities. But inasmuch as the statutes that dealt with alienation of the one kind also dealt with the other, the term “mortmain” is sometimes loosely used to include alienation to charities. The early statutes dealing with alienation to corporations are—9 Henry III. c. 36 (*Magna Carta*); 7 Edw. I. c. 13 (*De Viris Religiosis*, called also the Statute of Westminster the Second); 13 Edw. I. c. 32; 15 Rich. II. c. 5; and 23 Hen. VIII. c. 10. By these, alienation to corporations without licence in mortmain from the Crown, and a licence also from the lord, if any, from whom the land was held, was made a cause of forfeiture. The consent of the lord, which in later times grew to be of little practical importance, was subsequently dispensed with by 7 & 8 Will. III. c. 37. The same Act (passed but a few years after the Bill of Rights) expressly declared the right of the Crown to grant licences in mortmain—thus precluding any doubt as to whether such right was constitutional as being an exercise without consent of Parliament of the “suspending power” by the Crown over the laws.

Alienation in mortmain is not void but voidable only, and was good if the right of the Crown or lord to re-enter remained unexercised. The right is enforced by entry. The Acts aim against alienation in perpetuity, and therefore leases are not within the Acts.

Exemptions from the law of mortmain have from time to time been introduced by statute, and corporations of certain kinds have been thereby enabled to hold lands without licence from the Crown. Of these may be mentioned—

1. *Incorporated Charities* (by virtue of 18 & 19 Vict. c. 124, s. 35; 33 & 34 Vict. c. 34) may, with the consent of the Charity Commissioners, invest money received from any sale, or by way of equality of exchange or

partition of land belonging to the charity, in the purchase of land; and may hold such land, and also land received in exchange or partition, without licence in mortmain.

2. *Joint-Stock Companies* incorporated under the Joint-Stock Companies Acts, and companies generally under the Companies Acts, 1862 to 1890, may likewise hold land without licence by virtue of the provisions in the Acts. But companies formed for the purpose of promoting art, science, religion, charity, or any other like object not involving the acquisition of gain, may not, without the consent of the Board of Trade, hold more than two acres of land; the Board, however, may by licence empower it to hold land in any quantity, and subject to certain conditions (Companies Act, 1862, s. 21). And where corporations have been incorporated by private Acts of Parliament, similar powers to hold land have been given them by these Acts.

The present law on the subject is contained in Part I. of the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42). It repeals the old statutes against mortmain above noticed, and expressly saves the operation or validity of any charter, licence, or custom in force at the passing of the Act, enabling land to be assured or held in mortmain. It enacts that land shall not be assured to, or for the benefit of, or acquired by, or on behalf of any corporation in mortmain otherwise than under the authority of a licence from the Crown, or of a statute for the time being in force; and if any land is so assured the land shall be forfeited to the Crown, who may enter and hold the land. If, however, the land is held directly of a mesne lord under the Crown, the mesne lord may enter any time before twelve months from the date of the assurance; and if the land is held of more than one mesne lord, the superior lord may enter any time within six months after the expiration of the inferior lord's right of entry. If the right is exercised by a mesne lord, the land shall be forfeited to that lord instead of to the Crown. It re-enacts the provisions already noticed of 7 & 8 Will. III. c. 37 (repealed by the Act), and also provides that no entry or holding by or forfeiture to the Crown shall merge or extinguish or otherwise affect any rent or service which may be due in respect of any land to the Crown or other lord thereof.

"Land" is defined by the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), repealing the definition in the Act of 1888, as "tenements and hereditaments, corporeal or incorporeal, of any tenure, but not money secured on land or other personal estate arising from or connected with land."

For details as to the provisions and effect of the modern Mortmain and Charitable Uses Acts, and also the exemptions therefrom, see CHARITIES.

Mortuary.—This word is used in different significations. In the old ecclesiastical law it meant a payment to the church on the decease of a member of it (see Burn, *Eccl. Law*, vol. ii.).

In modern usage it denotes a place for the reception of dead bodies before interment. Statutory power to provide such places was first given to Boards of Health by the Public Health Act, 1848, 10 & 11 Vict. c. 63, s. 81; this power was extended by the Sanitary Act, 1866, 29 & 30 Vict. c. 90, s. 27, to all nuisance authorities. These sections were repealed and re-enacted by the Public Health Act, 1875, 38 & 39 Vict. c. 55, s. 141, with the important addition that, where required by the Local Government Board, a local sanitary authority *must* provide a mortuary. Such

authorities have general powers under the Act of acquiring land, if necessary, by compulsion (ss. 175 and 176), and so may obtain a site for this purpose. But neighbours, not unnaturally, may object to the establishment of a mortuary in a populous neighbourhood. The most suitable site is often in an existing churchyard or burial-ground, and the ecclesiastical Courts are willing in proper cases to grant a faculty for the erection of a mortuary there (*Hansard v. St. Matthew, Bethnal Green*, 1878, 4 P. D. 46). Where a mortuary has been provided, the local authority may make by-laws with respect to its management and to the charges for its use, and may provide for the decent and economical interment, at charges to be fixed by such by-laws, of any dead body which may be received into a mortuary (Act of 1875, s. 141). The Local Government Board have issued a series of model by-laws, which local authorities may adopt wholly or in part.

Local authorities may also provide and maintain places for the reception of dead bodies during the time required to conduct any post-mortem examination ordered by a coroner or other constituted authority. The place must not be at a workhouse or mortuary (s. 143). The coroner may order the removal of a body to and from such place for the purpose of carrying out such post-mortem examination, and the costs of such removal are part of the costs of holding an inquest (50 & 51 Vict. c. 71, s. 24).

Where the body of any person who has died of infectious disease is retained in a room in which persons live or sleep, or any dead body which is in such a state as to endanger the health of the inmates is retained in any house or room, any justice of the peace may, on a certificate signed by a legally qualified medical practitioner (see **MEDICINE**), order the removal of the body to any mortuary provided by a local authority, at their cost. Any person obstructing the execution of such an order is liable to a penalty (s. 142). Such orders are usually obtained *ex parte*, without observing the formalities required for procedure before a Court of summary jurisdiction, but when made, parties charged with obstructing their execution cannot dispute their validity (see *Booker v. Taylor*, *Times*, 21st Nov. 1882).

The regulations for London are now given by 54 & 55 Vict. c. 76, ss. 88–93. They are similar in most respects to those above described, which apply to the rest of England. In London every sanitary authority *must* provide a mortuary (s. 88), and may, and if required by the County Council must, provide a separate place for post-mortem examinations; but such examinations may not be conducted in a mortuary (s. 90). Sanitary authorities may, with the approval of the County Council, combine for the purpose of providing a mortuary or place for holding post-mortem examinations jointly (s. 91). Places for holding inquests must be provided by the County Council, and they may by agreement be in connection with a mortuary or place for post-mortem examinations provided by a sanitary authority (s. 92). The County Council is further empowered to provide one or two morgues or places in which bodies may be retained or preserved with a view to identification (s. 93).

Mosses.—See *Quin v. Shields*, 1877, Ir. R. 11 C. L. 254, where the words “all mosses” as used in a fee-farm grant and controlled by the context were held to mean all places in which turf, or matter in the course of becoming turf, was found, including the soil of such places.

Most Favoured Nation.—See **TREATIES**.

Most Rent.—See *Doe d. Newnham v. Creed*, 1815, 4 M. & S. 371.

Motion.—A motion is a method of making an application to the Court where in the course of the proceedings it is necessary to invoke its assistance in any matter requiring to be speedily dealt with. It differs from a PETITION in this, that it is founded on no written statement of the facts, but is made by counsel *ore tenus*.

Originating Motions.—Originating motions (which in practice are comparatively rare) are so termed where a notice of motion forms the initial step in the proceedings. In such case the notice of motion must, in the Chancery Division, be assigned to one of the judges of that Division, under the provisions of Order 5, r. 9 (c) of the Rules of the Supreme Court, 1883.

Motions of this nature are principally confined to applications under various Acts of Parliament, as, for instance, under the Companies Act, 1862 (25 & 26 Vict. c. 89), to rectify the register of a limited company, or under the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), to rectify the register of trade marks.

An originating notice of motion may be amended, at anyrate where no new relief is sought, without requiring a new notice of motion to be filed (*In re King & Co.'s Trade Marks*, [1892] 2 Ch. 462). It cannot be served out of the jurisdiction (*In re La Compagnie Générale d'Eaux Minérales, etc.*, [1891] 3 Ch. 451).

Motions for Orders nisi.—Prior to the Judicature Acts applications by motion in the Courts of Common Law were usually heard *ex parte* in the first instance, and an order (or rule) *nisi* was obtained, a day being fixed for the opposite party to show cause against it. Under the present practice this method of procedure has fallen largely into disuse. For, by Order 52, r. 2 of the Rules of the Supreme Court, 1883, it is provided that no motion or application for a rule *nisi*, or order to show cause, shall hereafter be made in any action, or (a) to set aside, remit, or enforce an award, or (b) for attachment, or (c) to answer the matters in an affidavit, or (d) to strike off the rolls, or (e) against a sheriff to pay money levied under an execution. The rule is an enlargement of the corresponding one in the Rules of the Supreme Court, 1875 (Order 53, r. 2), which was confined to applications in an action. Under that rule it was held that on an application to enforce an award where the submission had been made a rule of Court, the old practice still prevailed, and a rule *nisi* was granted (*In re Phillips & Gill*, 1875, 1 Q. B. D. 78); and so in the case of an application for assignment of an administration bond (*In the goods of Cartwright*, 1876, 1 P. D. 422). Of the above examples, the former would, the latter would not, come within the present rule. On the other hand, a rule calling on the sheriff to pay over to the plaintiff's solicitor money levied under a *fi. fa.* was held to be a rule granted in an action, and therefore requiring notice to be given (*Delmar v. Freemantle*, 1878, 3 Ex. D. 237). It follows that in cases not within the provisions of the rule, an application for an order *nisi* may still be made. Thus in *Matthews v. Ovey*, 1884, 13 Q. B. D. 403, it was held that an appeal from the decision of a County Court judge should be by *ex parte* motion in the first instance, and not by notice of motion. As to the practice on motions for orders *nisi*, see Chitty's *Archbold's Practice*, pp. 1386–1395.

Ordinary Motions.—Such being the position of the practice as to motions to show cause, that much larger class, which is of constant occurrence in the conduct of actions in the High Court, demands consideration.

Such motions may be classified as being (1) Of Course, or (2) Special. And, again, special motions may be either *ex parte* or on notice.

Motions of Course.—Motions of course are confined to the Chancery Division. In modern practice they are much less frequent than was formerly the case. A familiar instance of a motion of course is an application for an order for foreclosure absolute, where the party having the right to redeem has failed to attend and pay the redemption money on the day named in the Master's certificate.

An order of course is defined by the Rules of the Supreme Court to be "an order made on an *ex parte* application, and to which a party is entitled as of right on his statement and at his own risk" (App. N. No. 195). Accordingly, on a motion of course no notice is required to be given to any party (*Eyles v. Ward*, 1730, Mos. 255). A motion of course is not moved in Court, but a motion paper, signed by counsel, is handed to the registrar in Court, who enters it in his book. The order is drawn up at the order of course seat in the registrar's office (Daniell's *Ch. Pr.* p. 1547).

Special Motions.—As has already been stated, these may be either *ex parte* or on notice. With respect to them, the provisions of R. S. C. 1883, Order 52, must be regarded.

Where any application is authorised to be made to the Court or a judge, it must, if made to a Divisional Court, be made by motion (Order 52, r. 1). As to the proceedings to be heard or determined before Divisional Courts, see Order 59, r. 1.

Except, where according to the existing practice at the time of the passing of the Judicature Act any order or rule might be made absolute *ex parte* in the first instance, and except where notwithstanding r. 2 (*supra*) a motion or application may be made for an order to show cause only, no motion is to be made without previous notice to the parties affected thereby. But the Court or a judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make an order *ex parte* upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Court or judge may think just; and any party affected by such order may move to set it aside (Order 52, r. 3).

Ex parte Motions.—A motion may be made *ex parte* in the following cases:—

(1) Where a case of pressing urgency requiring the prompt interference of the Court is shown to exist, of which an application for an injunction suggests itself as the most familiar example. In such cases the Court will make an order which has the effect of preserving the subject-matter of the action *in statu quo* until an opportunity is afforded for argument on the merits (see INJUNCTION).

(2) Where the application is one merely for the purpose of obtaining leave from the Court to take a step which is outside the ordinary course of procedure, as, *e.g.*, for leave to serve short notice of motion.

(3) Where there is no person who could be served, as, *e.g.*, an application for substituted service.

On all *ex parte* applications care must be taken that the utmost good faith (*uberrima fides*) is kept with the Court, for if material facts are suppressed, the order will be discharged with costs (*Sturgeon v. Hooker*, 1847, 1 De G. & Sm. 484; *Dalglisch v. Jarvie*, 1850, 2 Mac. & G. 231; *Republic of Peru v. Dreyfus*, 1886, 55 L. T. 802). An application to discharge an *ex parte* order should be made to the judge to whose Court the cause in which the order was made is attached, and not to the Court of Appeal (*Boyle v. Sacker*, 1888, 39 Ch. D. 249).

Motions on Notice: The Notice of Motion.—In the case of motions on notice the first step is for the applicant to serve a notice of motion, which is a document in writing setting forth the particular relief sought from the Court. A form of notice is provided in the Rules of the Supreme Court (App. B. No. 18).

Every notice of motion to set aside, remit, or enforce an award, or for attachment, or to strike off the rolls, must state in general terms the grounds of the application (Order 52, r. 4).

Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon must be stated in the notice of motion (Order 70, r. 3). Non-compliance with this rule is a sufficient ground for depriving a party, even though successful in his application, of costs (*Baillie v. Goodwin & Co.*, 1886, 33 Ch. D. 604).

The notice of motion should state the day on which the Court will be moved, with the addition of the words "or so soon thereafter as counsel can be heard."

No notice of motion can be served on behalf of a person admitted to sue or defend as a pauper, except for the discharge of his solicitor, unless it is signed by his solicitor (Order 16, r. 29); and it is the duty of the solicitor assigned to a pauper to see that no notice is served without good cause (Order 16, r. 30).

In the Queen's Bench Division motions are entered in a list and are heard on the days appointed for the purpose. In the Chancery Division one day a week is fixed in the Court of each judge for hearing motions, and the notice of motion should be given for that day, unless special leave has been obtained to serve the notice for any other day. Notice is good if given for a day not in the sittings (*In re Coulton*, *Hamling v. Elliott*, 34 Ch. D. 22, not following *Daubney v. Shuttleworth*, 1876, 1 Ex. D. 53). In *Williams v. De Boinville*, 1886, 17 Q. B. D. 180, leave was given to amend.

Length of Notice.—Unless special leave to the contrary be given, there must be at least two clear days between the service of a notice of motion and the day named in the notice for hearing, but on applications to answer matters in an affidavit, or to strike off the rolls, at least ten days' notice is required (Order 52, r. 5). In urgent cases leave to serve short notice of motion can be obtained. Such leave can only be granted by the judge in person, and not by a Master at chambers even in vacation (*Conacher v. Conacher*, 1881, 29 W. R. 230). The fact that leave to serve short notice of motion is applied for must be distinctly stated to the Court, and the fact that leave to serve short notice has been granted must appear on the face of the notice itself (*Darvson v. Beeson*, 1882, 22 Ch. D. 504; *Mander v. Falcke*, [1891] 3 Ch. 488).

Service.—The plaintiff is at liberty, without special leave, to serve notice of motion upon any defendant, who having been duly served with a writ has not appeared within the time limited for that purpose (Order 52, r. 8). Where default in appearance has been made, the notice may be filed in the Central Office under the provisions of Order 67, r. 4. This general statement, however, is subject to this qualification, that a motion for attachment ought, at any rate where the address of the defendant is known, to be personally served (*In re Bassett*, *Bassett v. Bassett*, [1894] 3 Ch. 179), though in two earlier cases, where the defendant had been personally served with the order of which a breach had been committed, filing the notice of motion was held to be sufficient service (*In re Morris*, *Morris v. Fowler*, 1890, 44 Ch. D. 151; *In re Evans*, *Evans v. Noton*, [1893] 1 Ch. 252).

Where an appearance has been entered, the notice of motion may be served on the solicitor on the record, or at the address for service if the defendant has appeared in person (Order 67, r. 2). This extends to the case of a notice of motion for attachment, at any rate where, but for the Judicature Rules, the party moving would have been entitled to issue an attachment without leave (see Memorandum of Mr. Lavie, *In re Evans*, *Evans v. Noton*, [1893] 1 Ch. 252 (n)). On the other hand, it is well settled that a notice of motion to commit requires personal service (*Angerstein v. Hunt*, 1801, 6 Ves. 487; *Ellerton v. Thirsk*, 1820, 1 Jac. & W. 376; *Hope v. Carnegie*, 1868, L. R. 7 Eq. 254; *Mander v. Falcke*, [1891] 3 Ch. 488).

By leave of the Court or a judge, notice of motion may be served upon a defendant with the writ of summons, at any time after service of the writ, and before the time limited for appearance (Order 52, r. 9).

It has been held that leave cannot be obtained to serve notice of motion for an injunction with the writ on a defendant out of the jurisdiction before appearance (*Manitoba and North-Western Land Corporation v. Allan*, [1893] 3 Ch. 432). But in *Overton v. Burn*, 1896, 74 L. T. 776, the Court of Appeal allowed service of notice of motion for an interlocutory injunction, together with notice of the writ on a foreigner resident out of the jurisdiction, without prejudice to any question which might be raised on the order, following *Hersey v. Young*, 1894, W. N. 18.

Evidence on Motions.—As in the case of other interlocutory applications, evidence on motions may be by affidavit, though the Court may order cross-examination on such affidavits (Order 38, r. 1). The discretion of the Court as to allowing or refusing cross-examination is absolute (*La Trinidad v. Browne*, 1887, 36 W. R. 138). Statements as to the belief of a witness are admissible in affidavits filed on a motion, but the grounds of belief must be stated (Order 38, r. 3).

It is a matter of indulgence to allow fresh evidence to be gone into after a motion has once been opened (*Jacobs v. Brett*, 1875, L. R. 20 Eq. p. 5). Where the hearing of a motion is ordered to stand over on certain terms till the hearing of the cause, no new evidence can be filed on the motion (*Singer v. Audsley*, 1872, L. R. 13 Eq. p. 405).

Where Notice of Evidence to be given.—In cases within Order 52, r. 4, copies of the affidavits intended to be used must be served with the notice of motion. This rule is strictly construed, particularly in cases affecting the liberty of the subject. It extends even to affidavits of service or otherwise relating to procedure (*Evans v. Evans*, 1893, 67 L. T. 719; *Taylor v. Roe*, 1893, 68 L. T. 213; *In re Dunning*, *Sturgeon v. Lawrence*, 1894, 71 L. T. 57; *Hall v. Trigg*, [1897] 2 Ch. 219). The conduct of the respondent may be such as to amount to a waiver of the irregularity where there has been an omission to comply with the rule (*Rendell v. Grundy*, [1895] 1 Q. B. 16). In the case of *In re Wyggeston Hospital and Stephenson*, 1885, 33 W. R. 551, omission to serve copies of the affidavits with a notice of motion to set aside an award was not held fatal, as it was considered that under Order 70, r. 1, the Court had power to condone the irregularity; and see *Hampden v. Wallis*, 1884, 26 Ch. D. 746; *Petty v. Daniel*, 1886, 34 Ch. D. 172.

Hearing of Motion.—In the Chancery Division motions are ordinarily heard on the special days (usually one day in each week during the sittings) appointed for the purpose. The judge calls on counsel to move according to their seniority, each counsel having the right to move twice. Motions for discharge from custody are entitled to priority over those for other purposes (*Ashton v. Shorrocks*, 1880, 29 W. R. 117).

Saving Motion.—A counsel instead of moving may save his motion to the next motion day with consent of the other side, or by leave of the Court. If he neither moves nor saves it, the motion will be treated as abandoned, and the party serving the notice will be ordered to pay the costs (*In re Bananen Iron Co.*, 1852, 17 Jur. 127; and see *Wedderburn v. Llewellyn*, 1865, 13 W. R. 939). A motion cannot be treated as abandoned until the “seal is closed,” that is to say, until the paper of cases in the list for the day is called.

Power of Court on hearing Motion.—If, on the hearing of a motion, the Court or a judge shall be of opinion that any person to whom notice has not been given ought to have or to have had such notice, the Court or judge may either dismiss the motion or adjourn the hearing thereof, in order that such notice may be given upon such terms, if any, as the Court or judge may think fit to impose (Order 52, r. 6).

The hearing of any motion may from time to time be adjourned upon such terms, if any, as the Court or judge shall think fit (Order 52, r. 7).

Orders on Motion.—The Court will not on motion decide the main point in the action unless, as constantly happens, the parties agree that the hearing of the motion shall be treated as the hearing of the cause.

Where the respondent to a motion does not appear, and the order is made on affidavit of service, such order must not depart from the terms of the notice of motion, even though it be less extensive than the notice of motion, if such less extensive order may be more prejudicial to the party against whom it is made than would have been the larger one which was asked for (*Hutton v. Hepworth*, 1848, 6 Hare, 315).

On the motion coming on for argument, the Court frequently orders that it should stand to the hearing of the action.

Costs on Motions.—Even though the notice of motion does not ask for costs, there is power to award them (*Powell v. Cockerell*, 1846, 4 Hare, 572; *Clark v. Jacques*, 1849, 11 Beav. 623); but not, it seems, where the respondent does not appear (*Pratt v. Walker*, 1854, 19 Beav. 261).

An order for costs on an *ex parte* motion is irregular (*Nokes v. Gibbon*, 1857, 5 W. R. 216; *Cast v. Poyser*, 1857, 26 L. J. Ch. 353).

Rule where Order silent as to Costs.—The following rules as to making costs of motions costs in the cause, where no mention of costs is made in the order, were laid down by Sir John Leach, V.C., 1823, 1 S. & S. 357:—

(1) That the party making a successful motion is entitled to his costs as costs in the cause, but the party opposing is not.

(2) That the party making a motion which fails is not entitled to his costs as costs in the cause, but the party opposing it is entitled to his costs as costs in the cause.

(3) That when a motion is made by one party and not opposed by the other, the costs of both parties are costs in the cause.

Where a motion for an injunction was ordered to stand over until the hearing, and the plaintiff ultimately succeeded in obtaining a decree with costs which was silent as to the costs of the motion, it was held that under the first of the above rules he was entitled to such costs as being those of a successful motion (*Mounsey v. Earl of Lonsdale*, 1870, L. R. 10 Eq. 557; 6 Ch. 141).

Where the Court orders a motion to stand to the hearing, it simply reserves to itself the power of dealing with the costs of it differently from the costs in the cause (*Singer v. Audsley*, 1872, L. R. 13 Eq. 401).

Where the plaintiff's bill was dismissed, the defendant was allowed under the second rule his costs of a motion which stood over until the

hearing (*Witt v. Corcoran*, 1871, L. R. 13 Eq. 53; and see *Gosnell v. Bishop*, 1888, 38 Ch. D. 385).

The exceptions to the above rules are thus summed up in a leading authority on the subject:—

(1) Where the merits of the costs are reserved until the trial; (2) where the motion is rendered necessary by the default of the moving party, or for some other reason he is asking for an indulgence; (3) where the motion is rendered necessary by the opposite party's default; or (4) where the motion is irregular (*Morgan and Wurtzburg on Costs*, pp. 49–65, where the cases are collected).

The following rule as to the costs of interlocutory applications has recently been laid down by the judges of the Chancery Division:—Where interlocutory applications have been ordered to stand to the trial, and are not then mentioned to the judge, the costs of such applications are to be treated as costs in the action, and taxed accordingly, and need not be mentioned in the judgment. Where such applications have been disposed of, but the costs have been reserved, such costs are not to be mentioned in the judgment or order, or allowed on taxation, without the special direction of the judge (*British Natural Premium Provident Association v. Bywater*, [1897] 2 Ch. 531).

Where complete Relief obtained on Motion.—Where the object of the action is attained on motion, the plaintiff ought to apply to the defendant to have the costs disposed of on motion, otherwise he will not be allowed the extra costs of bringing on the action to trial (*Sonnenschein v. Barnard*, 1888, 57 L. T. 712).

Costs of abandoned Motions.—Under the practice of the Court of Chancery the following practice prevailed with respect to the costs of an abandoned motion:—

“When a party gives a notice of motion, and does not move accordingly, he shall pay to the other side costs to be taxed by the taxing master, unless the Court itself shall direct, upon production of the notice of motion, what sum shall be paid for costs” (Cons. Order 40, r. 23).

Although the above rule has been repealed and there is no corresponding provision in the Rules of the Supreme Court, the same practice is in force. Thus where defendants gave notice of motion and failed to appear, they were ordered to pay the plaintiff's costs (*Berry v. Exchange Trading Co.*, 1875, 1 Q. B. D. 77).

As to what have been treated as abandoned motions, see *Morgan and Wurtzburg*, p. 65. Where a respondent appeared after being served with a notice of motion which was on the face of it bad, he was not allowed his costs, the plaintiff not appearing to support the motion (*Darubney v. Shuttleworth*, 1876, 1 Ex. D. 53).

The costs of an abandoned motion must be applied for on the next Court day after the day for which the notice of motion was given (*Woodcock v. Oxford, Worcester, and Wolverhampton Rwy. Co.*, 1853, 17 Jur. 33; and see *Eccles v. Liverpool Borough Bank*, 1859, John. 402; *Farguharson v. Pitcher*, 1828, 4 Russ. 510; *Yetts v. Biles*, 1877, 25 W. R. 452).

Where it is intended to ask for the costs of a motion as abandoned, notice of such intention should be given to the other side (*Aitken v. Dunbar*, 1877, 25 W. R. 366); and the costs of an application for the costs of a notice of appeal which has been abandoned will not be allowed unless such costs have previously been applied for and payment has been refused (*Griffin v. Allen*, 1879, 11 Ch. D. 913).

The costs of an abandoned motion must be paid before a renewed motion will be heard (*Bellchamber v. Giani*, 1819, 3 Madd. 550).

In *Harrison v. Leutner*, 1881, 16 Ch. D. 559, the Court inquired as to the practice of the taxing masters with regard to the costs which they allowed on taxing the costs of an abandoned motion. The principle is that the costs of all work in preparing, briefing, or otherwise relating to affidavits or pleadings reasonably and properly and not prematurely done down to the time of any notice which stops the work should be allowed; and the taxing master, having regard to the circumstances of each case, must decide whether the work was reasonable and proper and the time for doing it had arrived.

Party appearing having no Interest.—A party who has been served with a notice of motion, but who has no interest, ought not to appear merely to ask for costs (*Campbell v. Holyland*, 1877, 7 Ch. D. 166).

Appeal Motions.—All appeals to the Court of Appeal are brought by notice of motion. The appellant may by his notice of motion appeal from the whole or any part of any judgment or order, and the notice of motion must state whether the whole or part only of such judgment or order is complained of, and in the latter case must specify such part (Order 58, r. 1). See further, APPEALS, vol. i. of the present work.

[*Authorities.*—*The Annual Practice*, 1898; Chitty's *Archbold's Practice*, 14th ed., 1885, ch. cxxii.; Daniell's *Chancery Practice*, 6th ed., 1884, ch. xxiii.; Morgan and Wurtzburg on the *Law of Costs*, pp. 46–73; Seton's *Judgments and Orders*, 5th ed., 1891, ch. xxiv.]

Motion for Judgment.—It is provided by Order 40, r. 6, of the Rules of the Supreme Court, 1883, that, except where under the Judicature Acts or Rules, judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment.

To what Cases applicable.—Judgment may be thus obtained in the following cases:—

1. Where a defendant has made default in *appearance* to a writ of summons, and the case does not fall within any of the provisions of Order 13, rr. 3–9 (that is to say, where the writ is not indorsed for a liquidated demand, nor for detention of goods and damages, whether with or without a liquidated demand, nor with a claim for the recovery of land or mesne profits), then, upon filing of an affidavit of service, and, where there is no special indorsement under Order 3, r. 6, of a statement of claim, the action may proceed as if the defendant had appeared (Order 13, r. 12).

2. Where default is made in delivery of a *defence* in cases not within the provisions for judgment in default in rr. 2–10 of Order 27, the plaintiff may set down the action on motion for judgment, and such judgment will be given as upon the statement of claim the Court or a judge shall consider the plaintiff to be entitled to (Order 27, r. 11). In such case, where one of several defendants is in default, the action may be at once set down on motion for judgment against such defendant, or may be set down against him at the time when it is entered for trial or set down on motion for judgment against the other defendants (Order 27, r. 12). Where issues arise in any action other than between the plaintiff and defendant, if any party to such issue makes default in delivering any pleading, the opposite party may apply for such judgment, if any, as upon the pleadings he may appear to be entitled to (Order 27, r. 14).

3. Where admissions of fact have been made, either on the pleadings

or otherwise, any party may at any stage of a cause or matter apply to the Court or a judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the Court or a judge may upon such application make such order, or give such judgment, as the Court or judge may think just (Order 32, r. 6).

4. Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, the plaintiff may set down a motion for judgment as soon as such issues or questions have been determined. If he does not do so, and give notice thereof to the other parties within ten days after his right to do so has arisen, the defendant may set down a motion for judgment, and give notice thereof (Order 40, r. 7).

5. Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, any party who considers that the result of such trial or determination renders the trial or determination of the others of them unnecessary, or renders it desirable that the trial or determination thereof should be postponed, may apply for leave to set down a motion for judgment without waiting for such trial or determination, and the Court or judge may, if satisfied of the expediency thereof, give such leave, upon such terms, if any, as shall appear just, and may give any direction which may appear desirable as to postponing the trial of the other issues of fact (Order 40, r. 8).

The rules originally contained a provision (Order 40, r. 2) that, where at the trial a judge or referee abstained from directing any judgment to be entered, the plaintiff, or on his default the defendant, might set down a motion for judgment. But the practice has now been altered, and the judge must, at or after the trial, direct judgment to be entered as he shall think right, and no motion for judgment is required in order to obtain such judgment (Order 36, r. 39, introduced in February 1892); and every referee to whom a cause or matter is referred for trial must direct how judgment shall be entered, and such judgment shall be entered accordingly by a master or registrar as the case may be (Order 40, r. 2, substituted for original rule in February 1892).

In addition to the cases above stated, which comprise those (1) where facts are not put in issue, and (2) where facts are put in issue, there are provisions as to what can be done after the trial.

Where at or after a trial with a jury the judge has directed that any judgment be entered, any party may apply to set aside such judgment and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason that the finding of the jury upon the questions submitted to them has not been properly entered (Order 40, r. 3).

Where at or after a trial by a judge, either with or without a jury, the judge has directed that any judgment be entered, any party may apply to set aside such judgment and to enter any other judgment, upon the ground that, upon the finding as entered, the judgment so directed is wrong (Order 40, r. 4).

Where at a trial by a referee he has directed that any judgment be entered, any party may move to set aside such judgment, and to enter any other judgment, on the ground that, upon the finding as entered, the judgment so directed is wrong (Order 40, r. 6).

Applications under Order 40, rr. 3, 4, are by motion of appeal to the Court of Appeal (Order 40, r. 5); but in the Queen's Bench Division a motion to set aside a judgment directed by a referee is made to a Divisional Court (Order 40, r. 6; *Proudfoot v. Hart*, 1890, 25 Q. B. D. 42; *Gower v.*

Tobitt, 1891, 39 W. R. 193), though in the Chancery Division the application is to the Court of Appeal (*Serle v. Fardell*, 1890, 44 Ch. D. 299).

Default of Pleading.—The plaintiff is only entitled under Order 27, r. 11 (*supra*), to such relief as is asked by the statement of claim. Therefore, where in a foreclosure action the plaintiff claimed an account and payment of what should be found due, it was held that he was not entitled to an immediate judgment for the amount alleged by the statement of claim to be due on defendant's covenant, but only to judgment for an account and payment of the amount so ascertained (*Faithfull v. Woodley*, 1889, 43 Ch. D. 287; see *Gee v. Bell*, 1887, 35 Ch. D. 160; *Law v. Philby*, 1887, 35 W. R. 450).

In a foreclosure action against the mortgagor and incumbrancers subsequent to the plaintiff, the plaintiff is entitled in default of defence to a judgment allowing one period for redemption against all the defendants (*Platt v. Mendel*, 1884, 27 Ch. D. 246). As to form of order in such case, see *Biddulph v. Billiter Street Offices Co.*, 1895, 72 L. T. 834.

The Court will not look beyond the pleadings. Therefore in an action for specific performance, where neither the contract nor the property were sufficiently described in the statement of claim, judgment in default of defence was refused, and the plaintiff was required to serve an amended statement of claim (*Smith v. Buchan*, 1888, 36 W. R. 631; and see *Tacon v. National Standard Land Co.*, 1887, 56 L. J. Ch. 529).

Upon a motion for judgment under the rule, the Court has a discretion. It may give a final judgment or it may give a judgment which requires to be subsequently worked out, and which is in a sense an interlocutory judgment (*Charles v. Shepherd*, [1892] 2 Q. B. 622). There is the same discretion in the Court as to costs as in other cases (*Young v. Thomas*, [1892] 2 Ch. 134).

Counterclaim.—The rule applies to a case where the plaintiff fails to deliver a defence to a counterclaim (*Street v. Crump*, 1883, 25 Ch. D. 68; *Higgins v. Scott*, 1888, 21 Q. B. D. 10; *Jones v. Macaulay*, [1891] 1 Q. B. 221; and see *Lumsden v. Winter*, 1882, 8 Q. B. D. 650). And it matters not that the plaintiff's action has been dismissed for want of prosecution; for, under Order 21, r. 16, if a defendant sets up a counterclaim, and the action is dismissed, the counterclaim may still be proceeded with (*Roberts v. Booth*, [1893] 1 Ch. 52).

Judgment against one of several Defendants.—In cases within Order 27, r. 12, where the cause of action is severable, and judgment is applied for against one of several defendants, it is not necessary to serve the other defendants with notice of the motion (*Macmillan v. Australasian Territories Limited*, 1897, 76 L. T. 182).

Pleading delivered out of Time.—Where a pleading was delivered, though out of time, before notice of motion was served, judgment was refused (*Graves v. Terry*, 1882, 9 Q. B. D. 170). And so where, after notice of motion given, a defence was put in, it was held that it could not be treated as a nullity (*Gill v. Woodfin*, 1884, 25 Ch. D. 707), though in that case, as the defence disclosed no real answer to the action, the Court of Appeal ordered the notice of motion to be amended and judgment given for defendant on admissions in the defence. See, too, *Gibbins v. Strong*, 1884, 26 Ch. D. 66, where it was held that if a defence has been put in, though irregularly, the Court will not disregard it, but will see whether it sets up grounds of defence which, if proved, will be material, and if so, will deal with the case in such manner that justice can be done.

No Evidence accepted.—No evidence is required or will be accepted

(*Bagley v. Searle*, 1887, 35 W. R. 404; *Smith v. Buchan*, 1888, 36 W. R. 631; *Webster v. Vincent*, 1897, 77 L. T. 167).

The cases are conflicting as to whether, where there are infant defendants, evidence should be filed in proof of the allegations in the statement of claim. In *In re Fitzwater*, *Fitzwater v. Waterhouse*, 1883, 52 L. J. Ch. 83; *Gardner v. Tapling*, 1885, 33 W. R. 473, where defences on behalf of infants had either not been put in or had been withdrawn, such evidence was required. On the other hand, in *Ellis v. Robbins*, 1881, 50 L. J. Ch. 512; *National Provincial Bank v. Evans*, 1882, 30 W. R. 177, it was held that the proper course was to give notice of trial in the case of infant defendants.

In *Ripley v. Sawyer*, 1886, 31 Ch. D. 494, where there were infant defendants, judgment was given in a partition action without any affidavit.

Judgment on Admissions.—The rule (Order 32, r. 6) enables the plaintiff or defendant to get rid of so much of the action as to which there is no controversy (per Jessel, M. R., *Thorp v. Holdsworth*, 1876, 3 Ch. D. 637).

Time for Application.—As to the time for applying for an order, see *Brown v. Pearson*, 1882, 21 Ch. D. 716, where a plaintiff was held entitled to move after joinder of issue and notice of trial.

Mode of Application.—The usual course in the Chancery Division, under Order 32, r. 6, is to move for judgment on the admissions (*Cook v. Heynes*, 1884, W. N. 75). But an order may be obtained on summons where the defendant consents, and, unless that course be adopted, the plaintiff may be made to pay the extra costs occasioned by his adoption of the more costly course of procedure (*London Steam Dyeing Co. v. Digby*, 1888, 36 W. R. 497; *Allen v. Oakey*, 1890, 62 L. T. 724). In the Queen's Bench Division the application is made by summons (*Padgett v. Burns*, 1884, W. N. 10).

Discretion of Court.—There is a discretion in the Court as to making an order under the rule (*Mellor v. Sidebottom*, 1877, 5 Ch. D. 342; *In re Wright*, *Kirke v. North*, [1895] 2 Ch. 747).

Rule Permissive only.—The rule is permissive only, and it was held that a plaintiff did not waive his right to judgment on the admissions by not having moved under it (*Tildesley v. Harper*, 1877, 7 Ch. D. 403).

Practice, where some only of Defendants appear.—Where one of several defendants has not appeared, whilst the others have done so, and delivered defences, the plaintiff may move for judgment under the rule as against the defendants who have appeared under the rule, and against the defendant in default under Order 27, r. 11 (*Parsons v. Harris*, 1877, 6 Ch. D. 694; *In re Smith's Estate*, *Bridson v. Smith*, 1876, 24 W. R. 392).

One of several Co-plaintiffs cannot apply.—An application against a defendant must be made by all the plaintiffs, and not merely by some of them (*In re Wright*, *Kirke v. North*, [1895] 2 Ch. 747).

What is a sufficient Admission.—As to what constitutes a sufficient admission for an order for payment into Court, see *London Syndicate v. Lord*, 1878, 8 Ch. D. 84; *Freeman v. Cox*, 1878, 8 Ch. D. 148; *Porrett v. White*, 1885, 31 Ch. D. 52; *Hollis v. Burton*, [1892] 3 Ch. 226; *In re Beeny*, *French v. Sproston*, [1894] 1 Ch. 499; *Neville v. Matthewman*, [1894] 3 Ch. 345).

Unless the allegations in a statement of claim are specifically denied, the plaintiff is entitled to move for judgment as upon admission of facts

in the pleadings (*Rutter v. Tregent*, 1879, 12 Ch. D. 758; and see *Green v. Sevin*, 1879, 13 Ch. D. 589).

Service of Notice of Motion for Judgment.—A notice of motion for judgment may, in case of default of appearance, be delivered by being filed at the Central Office (Order 19, r. 10; Order 67, r. 4; *Dymond v. Croft*, 1876, 3 Ch. D. 512; *Morton v. Miller*, 1876, 3 Ch. D. 516).

How Heard.—In the Chancery Division motions for judgment are not brought on as ordinary motions, but are set down in the cause book. They can be marked “short,” on production of the usual certificate of counsel, and will then be placed in the paper on the first short cause day after the day for which notice is given (Notice of Judges, April 1876; *Annual Practice*, 1898, p. 765).

In the Queen’s Bench Division motions for judgment are now comparatively rare. In the case of a motion for judgment in any cause or matter in which there has been a trial thereof, or of any issue therein with a jury, such motion for judgment must be heard and determined by the judge before whom such trial by jury took place, and not by a Divisional Court, unless it is impossible or inconvenient that such judge should act, in which case such motion must be heard and determined by some other judge, to be nominated by the President of the Division to which the cause or matter belongs (Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 2; see *Stevens v. Marston*, 1890, 39 W. R. 129).

Time for Moving.—No motion for judgment can, except by leave of the Court or judge, be set down after the expiration of one year from the time when the party seeking to set down the same first became entitled to do so (Order 40, r. 9).

Power of Court on hearing Motion.—Upon a motion for judgment, the Court may draw all inferences of fact, not inconsistent with the findings of the jury, and if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made, as it may think fit (Order 40, r. 10) (see *Waddell v. Blockey*, 1878, 10 Ch. D. 416; *Hamilton v. Johnson*, 1879, 5 Q. B. D. 263; *Williams v. Mercier*, 1882, 9 Q. B. D. 337; *Clark v. Sonnenschein*, 1890, 25 Q. B. D. 464).

[*Authorities.*—*The Annual Practice*, 1898; Chitty’s *Archbold’s Practice*, 14th ed., 1885, ch. lxix.; Daniell’s *Chancery Practice*, 6th ed., 1882, ch. xiv.; Seton’s *Judgments and Orders*, 5th ed., 1891, ch. xiii.]

Motive.—There are two distinct matters to be taken into account in considering legal responsibility for an act—

1. Did the person sought to be made liable mean to do the act? Was his mind so far directing his limbs in doing the act as to make it his? Or did “*force majeure*,” or “act of God,” or irresistible compulsion, or utter accident (*Stanley v. Powell*, [1891] 1 Q. B. 86) make him the means of doing the act, rather than the intelligent agent? Or did he take so little care of what he was doing that the injury, though not directly meant, is imputable to him?

2. If he meant to do the act, why did he do it, *i.e.* what was his motive? In civil cases, apart from questions as to act of God or inevitable accident,

this ulterior motive is, as a general rule, not to be considered in fixing the fact of civil responsibility, *i.e.* it is immaterial whether the act was done from the highest motives in the supposed interest of the person wronged, or from an honest assertion of a supposed right, or from some feeling of ill-will or hostility or private gain (*Allen v. Flood*, [1898] App. Cas. 1).

Thus in an action of deceit, when it is established that a statement known to be false was deliberately made, and acted on by another to his damage, the motive for the lie is immaterial (*Foster v. Charles*, 1830, 6 Bing. 396; 31 R. R. 446). See MALICE; MALICIOUS PROSECUTION.

This may be stated in another way. As a general rule, in civil cases the cause of action depends on the interference with the private rights of another, and not on the motive with which it was done (*Allen v. Flood*, [1898] App. Cas. 1, absence of spite or ill-will), though the existence of an honest motive may influence the tribunal in mitigation of the damages awarded, *e.g.* where a libel is due to a slip of the pen or printer's error, or a trespass to land is made under an honest claim of right, or by inadvertence (Mayne on *Damages*, 6th ed., 44-46). These rules do not apply to actions founded on contract, except breach of promise of marriage (Mayne, 6th ed., 43).

On the other hand, proof of scandalous or vindictive motives in the commission of a wrong may warrant exemplary damages, *e.g.* in the case of seduction or libel (*Warwick v. Foulkes*, 1844, 12 Mee. & W. 507; *Terry v. Hutchinson*, 1868, L. R. 3 Q. B. 599).

In the case of many crimes a particular motive—an intent to steal, destroy, injure, or defraud, or “wilful” or “malicious” quality in the act or omission—is an essential element in the offence. But the existence of a laudable motive is not *per se* enough to deprive an act of its criminality or to extenuate (*Steele v. Brannan*, 1867, L. R. 7 C. P. 261), although its presence may be a ground for mitigating the severity of the punishment. This point has already been discussed under GUILTY MIND and MALICE. It was most fully considered in *R. v. Tolson*, 1889, 23 Q. B. D. 168, where all the views as to the elements constituting an offence were represented.

From another point of view the question of motive may be very important. Wherever a person is accused of doing a wrongful or criminal act, and there is no direct evidence that he did it, evidence of the existence of a motive for doing the act may assist in the determination that the accused person did the act, or may operate to get rid of any defence of absence of the intent necessary in law to constitute the wrong or crime. The principle regulating the admissibility of evidence of this kind is stated in *Makin v. A.-G. for N. S. W.*, [1894] App. Cas. 57, and its importance is illustrated by *Palmer's case*, 1856, reported and discussed in 3 Steph. *Hist. Cr. Law*, 389.

Mulct—A fine or penalty.

Multitude.—A “multitude” as used by Littleton, sec. 432, was said to mean ten or more, but Coke in his commentary upon this section says, “I could never read it restrained by the common law to any certain number, but left to the discretion of the judges” (*Co. Litt.* 257 *a*).

Municipal Corporations.

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Origin.—The word “municipality” derives its name from the Roman *municipium*—a free town possessing the right of Roman citizenship, but governed by its own laws. Such a type of community was well suited to the political genius of the Anglo-Saxons, and towns formed on this self-governing model and protected by royal or baronial charters sprung up rapidly in mediæval England. The important part played by these well-ordered and peaceable trading communities in breaking down the power of the feudal barons and reinforcing the weakness of the Crown is well known. They helped, says the historian Robertson, more than any other cause to introduce regular government, police, and arts. They are still the pillars of modern civilisation.

Boroughs of a rude kind existed from a very early period (see Professor Maitland’s *Domesday Book*), but it was not until the reign of Henry VI. that the first charter of municipal incorporation was granted. By the Municipal Corporations Act, 1835, the various chartered municipalities, which had grown up in the long interval between the Wars of the Roses and the date of the first Reform Bill, were brought under a comprehensive and uniform scheme of constitution and government, to the end, as the Act recites, “that the same might for ever be and remain well and quietly governed.” Between 1835 and 1882 no less than thirty-two amending Acts were added to the statute-book. All these are now consolidated in the Municipal Corporations Act, 1882, summing up in its 260 sections and 9 schedules the experience and progress of over four hundred years. London is legislated for separately, but 306 boroughs and cities, with a population of over 9 millions, are at the present moment regulated by the provisions of this Act, some 49 decayed boroughs having been weeded out by the Municipal Corporations Act, 1883. Of these 306 municipal corporations, 242 are ordinary boroughs, 64 are borough counties, that is to say they have, in addition to the incidents of an ordinary borough, the duties, powers, and privileges of an administrative county under the Local Government Act, 1888.

Many of the subjects touched upon in this article have been dealt with in other parts of the work under the proper alphabetical headings. But they cannot be excluded from an article the aim of which is to give a general survey of the law as to municipal corporations.

Constitution and Government of Borough.—A BOROUGH under the Act is

defined (s. 7) in the usual style of statutory circumlocution as a city or town to which the Act applies, and the Act applies (s. 6) to every city and town to which the Municipal Corporations Act, 1835, applied at the commencement of the Act of 1882, and to any town, district, or place whereof the inhabitants are incorporated after the commencement of the Act, and whereto the provisions of the Municipal Corporations Acts are under the Act of 1882 extended by charter. See p. 29.

Name.—The municipality is for purposes of identification to bear a name—*nomen collectivum*—"The Mayor, Aldermen, and Burgesses of the Borough of" If the borough is a city, the burgesses are styled citizens (s. 8). Who these "burgesses" or "citizens" are is defined by sec. 9 of the Act.

The Burgesses.—A person is not to be deemed a BURGESS unless enrolled. To be entitled to be enrolled as a burgess a person must be of full age, in occupation of some qualifying property, such as a house, warehouse, counting-house, shop, etc., must have resided for twelve months in the borough or within seven miles of it, and must have been rated to all the poor rates made during the qualifying period of twelve months in respect of the qualifying property, and must have paid the rates up to 5th of January before the following 20th July. These conditions fulfilled entitle the ratepayer to enrolment, unless he is an alien or has received union or parochial relief or other alms during the aforesaid twelve months, or is disentitled under some Act of Parliament. Medical or surgical assistance from the trustees of municipal charities or removal to a hospital does not count as relief, nor does an inhabitant's child being taught in any public or endowed school (s. 33 (4)).

The Council.—An abstract legal entity, convenient as it is to deal with, can only discover its mind and will through agents, and the Legislature has accordingly provided (s. 10) that the municipal corporation of a borough shall be capable of acting by the council of the borough, and that the council shall exercise all powers vested in the corporation by the Act or otherwise. This council, in other words, is to be the executive of the municipal corporation, but it is more than a mere executive body; it is the soul of the corporation, occupying a much more independent and autocratic position than the directors of a company for instance. The council is to consist of the mayor, aldermen, and councillors; and first of the mayor, inasmuch as by the Act he takes precedence in all places in the borough.

The Mayor.—The mayor is to be a fit person, elected by the council from among the aldermen or councillors, or persons qualified to be such (s. 15). His term of office is to be for one year, and he may receive such remuneration as the council think reasonable. A person who is elected mayor and refuses to act is liable to pay a fine not exceeding £100.

The Councillors.—A councillor must be a "fit" person; he must also be an enrolled burgess, must reside within fifteen miles, and be possessed of property or rated to the poor rate to a certain amount (s. 11). A woman is not in the technical sense a fit person (*Hope v. Lady Sandhurst*, 1889, 23 Q. B. D. 79), nor is an officer on full pay, nor a felon undergoing punishment. Infancy, bankruptcy, holy orders, elective auditorship, or the holding of any place of profit in the disposal of the council are also disqualifications; but drunkenness, it would seem, is not a disqualification (*Alexander v. Jenkins*, [1892] 1 Q. B. 797). An interest in any contract or employment with the council will disqualify, subject to certain exceptions (s. 12 (2)) (see *Nicholson v. Fields*, 1862, 7 H. & N. 810; *Simpson v. Ready*, 1845, 13 L. J. Ex. 193; *Tawsey v. White*, 1827, 5 Barn. & Cress. 125; *Fletcher*

v. Hudson, 1881, 7 Q. B. D. 611; *Miles v. M'Ilwraith*, 1883, 8 App. Cas. 120; *Mayor of Salford v. Lener*, [1891] 1 Q. B. 168). A councillor's term of office is three years (s. 13). One-third of the council—those who have been longest in office—are to retire in rotation every year.

The Aldermen.—The number of these is to be one-third of the councillors. They are elected by the council, and must be either councillors or qualified to be councillors. The term of office for aldermen is six years—twice that of councillors, one-half of the body—the longest in office—retiring in rotation every year. The aim of the Legislature seems to have been to create or rather perpetuate in the aldermen of a borough an office of dignity and influence in local affairs, and of greater permanence than that of councillor; and in accordance with this aldermen have generally been selected from the justices of the peace or persons whose rank and position in the county, experience in local affairs or special knowledge, peculiarly qualify them to aid and elevate the work of local self-government. Like the mayor, any qualified person elected to a corporate office and declining to accept it is liable to a fine not exceeding £50 (s. 34) (see *R. v. Wigan Corporation*, 1885, 14 Q. B. D. 908).

Town Clerk.—The chief officers of the council are the town clerk and the treasurer. Both offices cannot be held by the same person. The town clerk must be a fit person, not a member of the council (s. 17). He holds his office during pleasure. He is intrusted with the charge and custody of the corporation's deeds and charters. As town clerk, he can have no lien on these muniments, but as solicitor he may on papers on which he has done work in that capacity (*R. v. Sankney*, 1839, 5 Ad. & E. 423).

Treasurer.—The treasurer must not be a member of the council, and he, too, holds office during pleasure (s. 18).

By-Laws.—Corporation, mayor, councillors, aldermen, treasurer, town clerk are but means to an end; and the end for which all such municipal machinery is designed and to which it is directed is the welfare of the inhabitants of the borough. To secure this consummation the council is by sec. 23 of the Act empowered to make BY-LAWS for the good rule and government of the borough, and for the prevention and suppression of nuisances. And inasmuch as by-laws without a sanction are vain, the council is further empowered to impose fines not exceeding in any case £5 for enforcing the observance of such by-laws; and this power is not restricted to offences for which a summary method of punishment already exists (*Teale v. Harris*, 1896, 60 J. P. 744). Our common law presumes every man to know the law, but in the case of these local laws or by-laws the Legislature has been careful to secure that everyone amenable to them shall have due notice or, at least, means of knowledge. No by-law is to come into force until the expiration of forty days after a copy thereof has been fixed on the town hall in a conspicuous place on or near the outer door (s. 232). The Legislature has also taken care that these by-laws shall not be improvidently made. Two-thirds at least of the council must be present at the making of a by-law, and the by-law when made must, unless it is one for the prevention and suppression of a nuisance, be passed by Her Majesty in Council (s. 23 (4)).

Validity of By-Laws.—A large body of case law has grown up touching by-laws and their validity. The criterion in all such cases—whether the by-law is the by-law of a railway company, of a corporation like the Trinity House, of a chartered trading company or a municipal corporation—is the same; is the by-law reasonable or unreasonable? is it, that is to say, reasonably necessary for the objects of the corporation—in the case of a

municipal corporation, for the good government of the borough? This consideration defines and circumscribes the legislative capacity of the council. A by-law cannot, for instance, be reasonable which is contrary to statute law, or to that common law which is the perfection of reason. Hence a by-law in undue restraint of trade is bad. Sec. 247 of the Act, indeed, expressly provides that notwithstanding any custom or by-law every person in any borough may keep any shop for the sale of all lawful wares and merchandises by wholesale or retail, and use every lawful trade, occupation, mystery, and handicraft for hire, gain, sale, or otherwise within any borough; but this recognition and respect for the right of free trading does not disable the council from making valid by-laws to *regulate* trading in the borough, *e.g.* by prohibiting the slaughtering of any animal within the walls of a city (*Pierce v. Bartrum*, 1775, Cowp. 269). Some illustrations of what are good by-laws and what are not may be instructive. The following have been held valid:—A by-law against any person frequenting or using any street or other place for the purpose of bookmaking or betting (*Burnett v. Berry* (No. 1), [1896] 1 Q. B. 641; 65 L. J. M. C. 118; *Jones v. Walters*, 1898, 78 L. T. 167); against keeping a shooting gallery, swingboat, or roundabout, to the annoyance of passengers in any street or public place or land adjoining (*Teale v. Harris*, 1896, 60 J. P. 744); a by-law prohibiting the use of any noisy instrument to the annoyance of any of the inhabitants, *n.b.* a concertina is a noisy instrument (*Booth v. Howell*, 1889, 53 J. P. 678); so, too, a by-law making it an offence for anyone to play upon a musical instrument, or sing, “or make any noise whatever in any street or near any house” within the borough after having been required by a householder or police constable to desist (*R. v. Powell*, 1885, 51 L. T. 92). On the other hand, a by-law that no person should play upon any musical instrument in any of the streets of a borough on Sunday was held bad (*Johnson v. Croydon (Mayor of)*, 1886, 16 Q. B. D. 708); likewise a by-law imposing a fine on anyone who should play upon any musical or noisy instrument, or should sing, recite, or preach in any street without having previously obtained a licence in writing from the mayor (*Munro v. Watson*, 1888, 57 L. T. 366). A by-law that parents should be liable to a penalty if they suffered a child to be selling articles in the streets after a certain hour was held *ultra vires* as too general and absolute (*Macdonald v. Lochrane*, 1887, 51 J. P. 629).

The town council of a borough made a by-law, “that if any butcher or dealer in meat or any fishmonger, poulterer, or other person shall expose or offer for sale on his premises, or have in his possession with intent to sell or expose for sale, any meat, fish, poultry, or other victuals or provisions unfit for the food of man, he shall be subject to a penalty to be recovered before justices who shall decide on the unfitness.” A grocer exposed for sale on his premises cheese which the justices held was unfit for food, and convicted him accordingly:—Held that to expose for sale or to have possession of with intent to sell, things unfit for human food, was a nuisance at common law, that consequently the by-law was within the powers of the corporation, and that the grocer was within the by-law (*Shillito v. Thompson*, 1876, 45 L. J. M. C. 18; 1 Q. B. D. 12; see also *Dunston v. Imperial Gas Co.*, 1833, 3 Barn. & Adol. 125). A by-law creating an offence, for which it imposes a fine or other punishment, must be clear and unambiguous in its language (*Foster v. Moore*, 1880, 4 L. R. Ir. 670). Every by-law may be repealed by the same body that made it (*R. v. Ashwell*, 1812, 12 East, 22).

Public Health Acts.—By-laws are, in the main, prohibitive, not mandatory. But, in addition to the regulative jurisdiction by by-laws, the

council is invested with the powers of an urban sanitary authority under the Public Health Act, 1875. The scheme of the Public Health Act by sec. 5 is to divide all England into certain districts, in each of which there is to be an authority either rural or urban, and each of such districts is to be subject thenceforth to the jurisdiction of the local authority established by the Act, and invested with the powers in the Act mentioned. In the case of a borough this authority is the mayor, aldermen, and burgesses acting by the council. The council and the urban authority are not in such a case two distinct bodies. The corporate body is the local board, and every contract made with the corporation acting as a local board, or with the corporation alone, is made with the corporation (*Andrews v. Ryde (Mayor of)*, 1874, L. R. 9 Ex. 302; 43 L. J. Ex. 172).

As urban authority, the council possesses a great variety of powers—the power of altering or discontinuing sewers, cleansing offensive ditches, closing polluted wells, compelling paving of streets, demolition of houses, disposal of sewage, enforcing ashpit and privy accommodation and purification of houses, laying water mains, etc. These powers are further enlarged for the purposes of urban improvement and embellishment by the Public Health Act, 1891. Under this Act a municipal council may adopt the powers of the Act with respect to the prevention of danger from telegraph wires, the disposal and carriage of refuse, the structure of floors, hearths, staircases, and the height of rooms to be used for human habitation, for keeping courts and passages clean; the powers with respect to the exposing for sale of articles unfit for human food, licensing of slaughter-houses, building operations, safety of platforms, balconies, cabmen's shelters, statues and monuments, closing parks and pleasure grounds, letting for hire pleasure-boats, music and dancing licences. The council may further, under the Local Government Act, 1894, take over the powers of any local authority constituted under the Lighting and Watching Act, 1833, the Baths and Washhouses Acts, 1846–1882, the Burial Acts, 1852–1885, the Public Improvements Act, 1860, the Public Libraries Act, 1892, and the Infectious Diseases Act, 1893. It may also extend the application of any local Act existing at the date of the Municipal Corporations Act for lighting part of a borough to the rest of the borough. Under the Electric Lighting Act, 1882 (s. 3), the Board of Trade may license a municipal corporation supplying electricity for lighting purposes. It may purchase gas and waterworks undertakings, but it can only do so by agreement, not compulsorily.

Boroughs, as above mentioned, are divided into two classes—ordinary boroughs and borough counties. In the case of these latter—borough counties—of which there are sixty-one, there is transferred to the council of the borough by the Local Government Act, 1888, the administrative business of the justices of the county in Quarter Sessions assembled, that is to say all business done by the Quarter Sessions or any committee appointed by the Quarter Sessions in respect of the several matters following:—(i.) The borrowing of money; (ii.) shire halls, county halls, assize courts, judges' lodgings, lock-up houses, court-houses, justices' rooms, police stations, and county buildings' works and property; (iii.) the licensing under any general Act of houses and other places for music or dancing, and the grant of licences under the Racecourses Licensing Act, 1879; (iv.) the provision, enlargement, maintenance, management, and visitation of, and other dealing with, asylums for pauper lunatics; (v.) the establishment and maintenance of, and the contribution to, reformatory and industrial schools; (vi.) bridges and roads repairable with bridges, and any powers vested by the Highways and Locomotives (Amendment) Act, 1878, in the county authority; (vii.) the

execution, as local authority, of the Acts relating to contagious diseases of animals, to destructive insects, to fish conservancy, to wild birds, to weights and measures, and to gas meters, and of the Local Stamp Act, 1869; (viii.) any matters arising under the Riot (Damages) Act, 1886; (ix.) the registration of rules of scientific societies under 6 & 7 Vict. c. 36; the registration of charitable gifts under 52 Geo. III. c. 102; the certifying and recording of places of religious worship under 52 Vict. c. 155; the confirmation and record of the rules of loan societies under 3 & 4 Vict. c. 110; (x.) any other business transferred by the Act (L. G. A. 1888).

Contracts.—A municipal corporation can only enter into such contracts as are within the scope of the objects for which it was incorporated. Any contract going beyond this limitation is *ultra vires*, and it is a corollary from this proposition that the governing body of a corporation cannot use the funds of the community for a purpose other than that for which the corporation was constituted (*Shrewsbury v. Birmingham Rwy. Co.*, 1857, 6 H. L. 113; *Taylor v. Chichester Rwy. Co.*, 1866, L. R. 2 Ex. 356; *Pickering v. Stephenson*, 1872, L. R. 14 Eq. 322).

But this will not prevent a corporation acting in any ordinary matter of business in the manner in which an individual conducting the same kind of business can act. There is nothing illegal, for instance, or *ultra vires* in a corporation defending its servant in an action of libel in respect of matter published by the servant if the matter complained of was published in the usual course of that business (*Breay v. Royal British Nurses Association*, [1897] 2 Ch. 272; 66 L. J. Ch. 587; and see *Taunton v. Royal Insurance Co.*, 1863, 2 H. & M. 135, and *Henderson v. Bank of Australasia*, 1888, 40 Ch. D. 170).

Sealing.—The general rule is that contracts by municipal corporations must be under seal (1 Black. Com. 475; Comyns, *Dig.* "Franchise," F. 12, 13; Bac. Abr. "Corp." E.; *Ludlow (Mayor of) v. Charlton*, 1840, 6 Mee. & W. 815; *Church v. Imperial Gas Light Co.*, 1838, 6 Ad. & E. 846; *Oxford (Mayor of) v. Crow*, [1893] 3 Ch. 535)—it is the only way in which a corporation can express its will, or do any act; and this requirement as to sealing is, as Rolfe, B., points out, no merely technical rule; the seal authenticates the concurrence of the whole body corporate. But whenever the rigour of the rule would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, an exception has been allowed, *e.g.* in such insignificant acts not affecting the revenues of the corporation, as appointing a mere servant—a butler, cook, or bailiff; but for appointment to an office of any importance, such as a medical officer (*Dylce v. St. Pancras Board of Guardians*, 1873, 27 L. T. 342), a solicitor (*Arnold v. Poole (Mayor of)*, 1842, 4 Man. & G. 860), a collector of poor rates (*Smart v. West Ham Union*, 1855, 10 Ex. Rep. 867), or clerk to master of workhouse (*Austin v. Guardians of Bethnal Green*, 1874, L. R. 9 C. P. 91), sealing is still necessary or the appointee cannot recover his salary. If the contract is executed, and the other party has had the benefit of it, the corporation may sue on it, but it does so on the executed consideration and the implied contract arising therefrom, not on the unsealed contract; and the same principle applies where the corporation has acted upon an executed contract, as by accepting rent; it is then to be presumed against the corporation that everything has been done to make a binding demise (*Doe d. Pennington v. Tanriere*, 1848, 12 Q. B. N. S. 998; 18 L. J. Q. B. 49; and see *Crook v. Seaford Corporation*, 1871, L. R. 6 Ch. 551). When sealed, the contract of a corporation is like that of an individual (*Dartford Union v. Trickett*, 1889, 59 L. T. 754). The seal must be affixed with the authority of the council

meeting as a council (*D'Arcy v. Tamar, Kit Hill, and Callington Rwy. Co.*, 1866, L. R. 2 Ex. 158).

Property of Corporation.—The general rule or policy of English law is that corporations can only hold land by licence from the Crown. This rule sprang from the jealousy with which the State viewed the growing acquisitions of ecclesiastical corporations and the locking up of land in the dead hand, and the Mortmain Acts—a shattered but picturesque ruin—still witness to the strength of the sentiment. The Municipal Corporations Act, 1882, so far relaxes the rule that it allows a municipal corporation to contract for the purchase of land either in or out of the borough, but (i.) it restricts the amount to five acres; and (ii.) the corporation can only make the purchase for certain specified objects—for building a town hall, council house, justices' room, with or without a police station and cells or lock-ups, quarter and petty sessions house or assize court-house, with or without judges' lodgings, a polling station, or some other building necessary or proper for the purposes of civic life. The Mortmain and Charitable Uses Act, 1888, now sanctions in addition to this the acquisition of land for a public park, garden, or recreation ground, or for a public museum; and the Military Lands Act, 1892, sanctions purchases for the purposes of that Act. If a municipal corporation desires to acquire land beyond this, the council must obtain the sanction of the Local Government Board. Nor can the council sell, mortgage, or alienate any corporate land without a similar sanction from the Local Government Board (M. C. A. 1883, s. 107), except where authorised to do so by some special Act of Parliament, as for building workmen's dwellings (35 & 36 Vict. c. 68, s. 10), or for baths and washhouses (9 & 10 Vict. c. 74, s. 24; 45 & 46 Vict. c. 30, s. 3), or for a public recreation ground (22 Vict. c. 27, s. 3; 53 & 54 Vict. c. 15). With this sanction, and subject to such conditions as the Board may direct as to investment, the council may sell, exchange, mortgage, charge, demise, lease, or otherwise deal with the corporate land, but without the paternal supervision of the Local Government Board all that the council can do is to grant leases for thirty-one years and seventy-five years respectively, and renewals on the terms specified in secs. 108, 109 of the Municipal Corporations Act, 1883. If a municipal corporation determines to convert any corporate land into sites for working-men's dwellings, and obtains the approval of the Treasury for so doing, the corporation may for that purpose make grants or leases for terms of 999 years, or any shorter term, of any parts of the corporate land.

Borough Fund.—The municipal machinery which has been sketched above cannot be worked, it is obvious, without expenditure, any more than any other administrative machinery, charitable, economic, or political. The source from which in the case of municipal corporations the working revenue is derived is the BOROUGH FUND. This fund is the borough chest or treasury, and into it go—but passing through the hands of the treasurer (s. 142)—the rents and profits of all corporate land, and the interest, dividends, and annual proceeds of all moneys, dues, chattels, and valuable securities belonging or payable to the corporation, or to any member or officer of it in his corporate capacity, and every fine or penalty for any offences against the Act. It may also be increased by the income of moneys received from the Secretary of State as a consideration for the transfer of barracks, store houses for arms and ammunition, or other buildings or land under the Militia Service Act of 1873. The revenue thus provided is applicable to the purposes of the corporation, but its application is strictly confined to the purposes authorised expressly or impliedly by the

Municipal Corporations Act or some other Act, and by the constitution of the borough. Any application to other than such purposes is *ultra vires*, and may be restrained by injunction (*A.-G. v. Aspinall*, 1833, 2 Myl. & Cr. 613; *A.-G. v. Norwich (Mayor of)*, 1833, Myl. & Cr. 406; *A.-G. v. Newcastle-on-Tyne (Mayor of)*, 1889, 23 Q. B. D. 492); only rents, profits, interests, dividends, and annual proceeds, moreover, can be spent; the principal cannot be touched. The payments to which the borough fund is applicable, and with which it is charged, are prescribed by sec. 140 of the Act, and specified, in part, in the fifth schedule. A distinction is there drawn between payments which may be made out of the fund without an order, that is, an order of the borough council, and payments which may not be made without an order. The payments which may be made without an order are the remuneration (if any) of the mayor, of the recorder, of the stipendiary magistrate, of the town clerk, treasurer, clerk of the peace, and any other officer appointed by the council, and of the clerk to the justices; also the remuneration and allowances certified by the Treasury to be payable to the Treasury in respect of an election. Payments which may not be made without an order are (*inter alia*) expenses incurred by overseers and town clerk in enrolling burgesses and holding municipal elections, the accommodation of an election Court, furnishing and maintaining corporate buildings, fees payable to the clerk of the peace and the borough coroner, to the borough police and watch committee, of altering wards, of obtaining a charter of incorporation, and all other expenses charged on the borough fund by any Act of Parliament, or necessarily incurred in carrying the Act (M. C. A.) into effect. All payments out of the borough fund are to be made by the treasurer (s. 142 (1)). Any order of the council for payment is to be signed by three members of the council, and countersigned by the town clerk (s. 141). If a payment order is challenged it may be disallowed wholly or in part by the High Court (Queen's Bench Division), irrespective of the independent remedy in Chancery by injunction (*A.-G. v. Blackburn Corporation*, 1888, 57 L. T. 385). The payments in the schedule are not exhaustive, and many doubtful and difficult questions are constantly arising as to what may and what may not be paid out of the borough fund, which may be illustrated by a few examples. Thus a municipal corporation cannot spend its funds in bringing an action for libel in respect of a letter charging the corporation with corruption, for it is only the individual and not the corporation in its corporate capacity who can be guilty of such an offence (*Manchester (Mayor of) v. Williams*, [1891] 1 Q. B. 94; 60 L. J. Q. B. 23); but it may, if the statement reflects on its character in the conduct of its business, without proof of special damage (*South Hetton Coal Co. v. North-Eastern News Association*, [1894] 1 Q. B. 133); nor can a municipal corporation, though lord of the manor, entertain juries of the manor to dinner and refreshments, and charge the expenses to the borough fund (*R. v. Bideford (Mayor of)*, 1883, 47 J. P. 756 n.), or pay out of the borough fund the costs of an officer of its own who has incurred a penalty under sec. 193 of the Public Health Act (*R. v. Ramsgate (Mayor of)*, 1889, 23 Q. B. D. 66; 58 L. J. Q. B. 352), or pay interest on a fund which the corporation is authorised to contribute to the endowment of a college (*A.-G. v. Cardiff (Mayor of)*, [1894] 2 Ch. 337), or satisfy a judgment given for a sum of money not legally due (*A.-G. v. Newcastle-on-Tyne*, 1889, 23 Q. B. D. 492). On the other hand, a corporation was held entitled to pay out of its borough fund a sum for the due celebration of Her Majesty's jubilee (*A.-G. v. Blackburn Corporation*, 1888, 57 L. T. 385); and a corporation may always pay out of

its corporate funds the expenses of defending any attack made by a Bill in Parliament on its property, powers, or privileges. A municipal corporation may also, under statutory authority, contribute to laying out and planting public walks or pleasure grounds (P. H. A. 1891, s. 45), to expenses incurred by a board of salmon conservators in exercise of their powers under the Sea Fisheries Act, 1888, or towards the expenses of any inquiry conducted by the Charity Commissioners into any charities which are by the trusts governing their administration expressly appropriated in whole or in part for the benefit of the borough. A municipal corporation may also pay the expenses of a library authority under the Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 18 (1) (a); as to the persons to vote on a requisition to ascertain the opinion of the ratepayers as to the adoption of the Public Libraries Act, see *A.-G. v. Croydon Corporation*, 1889, 42 Ch. D. 178; and 35 & 36 Vict. c. 91; 41 & 42 Vict. c. 26, s. 30; 51 & 52 Vict. c. 43, s. 4.

Borough Rate.—If the borough fund is insufficient to meet the demands upon it, the council, it would seem, has no power to contract a temporary loan until the amount can be obtained out of the rates (cp. *R. v. Reed*, 1880, 5 Q. B. D. 483). Recourse must be had to a borough rate. For the purposes of such a rate the council must from time to time estimate as correctly as it can what amount, in addition to the borough fund, will be sufficient for the purpose in view, giving in such estimate particulars of the proposed expenditure under general heads, but in sufficient detail to be explanatory of the purposes, and may order a rate to that amount to be made in the borough. Such a rate may be made retrospectively in order to raise money for the payment of charges and expenses incurred, or which have come in course of payment at any time within six months before the making of the rate. The contributions are to be assessed on the several parishes and parts of parishes in the borough, according to the valuation list in force for the time being according to the last poor rate; and for purposes of assessment the council may require the rate assessment books to be brought before them (s. 144 (7)); but the council only order the rate for the particular total amount; they do not fix the amount per pound to be paid; that is done by the overseers. If the overseers of a parish think that parish aggrieved by a borough rate, they may appeal to the recorder, or, if none, to the next Quarter Sessions for the county. When made, the rate is to be collected by the overseers of the parish or respective parishes, in the same way as the poor rate. The council have no power to collect it or to appoint overseers to collect it.

If a parish is wholly in a borough, the overseer pays the parish contribution out of the poor rate. If a parish is partly in and partly out of a borough, the overseers on receipt of an order for payment of money for the contribution of the part of a parish in the borough towards the rate, assess and levy from the occupiers of hereditaments rateable to the poor rate in that part of the parish the amount necessary for the contribution, and pay it over to the order of the town council; if the overseers fail to pay over, the remedy of the council is to levy off them by distress by virtue of a warrant signed by the mayor, and sealed with the corporate seal, or signed by the justices in and for the borough, not by mandamus to the overseer to levy a rate (*R. v. Hunslet Overseers*, 1863, 1 El. & El. 775). The granting of a distress warrant in such a case is a matter of discretion (*Tynemouth Union v. Backworth Overseers*, 1888, 57 L. J. M. C. 53). The proceeds of a borough rate when collected go to the borough fund, and are applicable to the same purposes as the borough fund. The corporation inserting in the precept

to the overseers the amount levied in the fund will not invalidate the rate (*Durham (Mayor of) v. Foulter*, 1889, 22 Q. B. D. 394).

If the borough fund is more than sufficient for the purposes to which it is applicable under the Act (M. C. A. 1882), or otherwise by law, the surplus is to be applied under the direction of the council for the public benefit of the inhabitants and improvement of the borough (s. 143). It is only, however, when the surplus arises from the rents and profits of the property of a municipal corporation that it can be applied in improving the borough by drainage, enlargement of streets, or otherwise. It would obviously be a dangerous power to intrust to town councils to allow them to pay for schemes of improvement out of a borough rate (cp. *R. v. Sheffield (Mayor of)*, 1872, L. R. 6 Q. B. 652; *A.-G. v. Birmingham*, 1866, L. R. 3 Eq. 552). Quarter Sessions boroughs are exempt from county rate; but, on the other hand, Quarter Sessions boroughs are liable in respect of the costs arising out of the prosecution, maintenance, and punishment of all offenders committed for trial from the borough to the assizes for the county, that is for its own prisoners (and see the Prisons Act, 1877, ss. 4, 57; the Local Government Act, 1888, ss. 32 (3) *a*, 35 (6), 38, 39 (1), 100; *Mullins v. Treasurer of Surrey*, 1881, 7 App. Cas. 1; *Prison Commissioners v. Corporation of Liverpool*, 1879, 4 Q. B. D. 329; 1880, 5 Q. B. D. 332). Sec. 153 gives the mode in which the borough is to account to the county.

Borrowing.—Municipal corporations find themselves frequently under a necessity of borrowing (see BORROWING POWERS)—in these days especially when improvements march fast—for the execution of public works. It may be the building of a town hall, public library, an assize Court, the inauguration of a new system of drainage, or the acquisition of waterworks and gasworks. Every facility is now offered for such schemes of municipal amelioration. Thus the council of a borough is empowered by sec. 120 of the Municipal Corporations Act, 1883, to borrow money for the purpose of building, enlarging, repairing, improving, and fitting up any building authorised by the Act, *e.g.* working-men's dwellings, and may levy a rate and mortgage it to repay the loan. The council may also borrow at interest on the security of any corporate land, or of the borough fund or borough rate (ss. 106, 112), under the Local Loans Act or otherwise. The sanction of the Local Government Board is required in such a case, and in giving it the Board may as a condition require that the money borrowed as the security of the mortgage or charge be repaid with all interest thereon in thirty years or any less period, and either by instalments or by means of a sinking fund, or both. Sec. 113 provides how such a sinking fund is to be formed, by the appropriation of yearly or half-yearly sums, to be accumulated at compound interest and invested. The legitimate investments are now prescribed by the Trustee Act, 1893. Under the Local Loans Act, 1875, and the Local Loans Sinking Fund Act, 1885, the town council of a borough may secure loans raised under the Acts by the issue of debentures and debenture stock. The Public Health Act, 1890, s. 52, further empowers a municipal corporation to borrow by the creation of stock.

Administration of Justice.—This is one of the most important functions and privileges of a municipal corporation (see, too, INFERIOR COURTS). Some boroughs possess a separate Court of Quarter Sessions. But where a borough has no such separate Court, the justices of the county in which the borough is situate are to exercise the jurisdiction of justices in and for the county. The Queen may, however, grant to the borough a separate commission of the peace and assign to any persons Her Majesty's commission to act as justices

in and for such a borough. Every borough justice must reside in the borough or within seven miles of it, or occupy a warehouse or other property in the borough. He must, before qualifying, take the usual oaths—the oaths of allegiance and the judicial oaths (s. 157) (see OATHS); but acts done by an unsworn justice are still valid (*Margate Pier Co. v. Hannam*, 1819, 3 Barn. & Ald. 266; 22 R. R. 378; *R. v. Jordan*, 1808, 9 East, 263 n.).

The mayor is *ex officio* a justice for the borough during his year of office, and also for the year succeeding his year of office. The mayor is entitled to precedence over all other justices acting in and for the borough, and is entitled to take the chair at all meetings of justices held in the borough at which he is present.

A solicitor or proctor is disqualified from being a justice of a county of a city or of a town in which he practises (34 & 35 Vict. c. 18, s. 1).

The jurisdiction of borough justices is the same with respect to offences committed and matters arising within the borough as that of a justice for a county with respect to offences committed and matters arising within the county (s. 158). County justices cannot exclude borough justices from taking part in the trial of a person for an offence alleged to have been committed within the borough (*R. v. Williamson*, 1890, 7 T. L. R. 534). As to the jurisdiction of borough justices in regard to the relief of the poor, see 12 & 13 Vict. c. 64, s. 1; 15 & 16 Vict. c. 38. A difficulty which inevitably arises in the case of borough justices is that such justices are commonly interested as councillors or ratepayers in cases coming before them. To meet this difficulty the Public Health Act, 1875 (s. 258), provides that no justice of the peace is to be deemed incapable of acting in cases arising under that Act by reason of his being a member of the local authority or being a ratepayer or one of a class liable to contribute to or to be benefited by any rate or fund out of which expenses are to be defrayed; but this is to be understood of a technical interest merely. If the justices have such a substantial interest as may give them a real bias, they ought not to act. They must not, for instance, hear a summons for nuisance in which they are practically prosecutors. If they do, the conviction will be quashed (*R. v. Millage*, 1879, 4 Q. B. D. 332; *R. v. Cumberland JJ., Ex parte Midland Rwy Co.*, 1848, 17 L. J. Q. B. 102; *R. v. Lee*, 1882, 9 Q. B. D. 394; *R. v. Great Yarmouth JJ.*, 1882, 8 Q. B. D. 525; *R. v. Mayor of Deal, Ex parte Curling*, 1882, 45 L. T. 439; *R. v. Henley*, [1892] 1 Q. B. 504), so scrupulously careful is the law of England to secure impartiality in those who administer justice.

When a separate commission of the peace is granted to a borough the council must provide and furnish a suitable justices' room with the offices, for the business of the borough justices. No room in a house licensed for the sale of intoxicating liquors may be used for this purpose.

Clerk to the Justices.—This person is appointed by the justices to the borough, and is removable at their pleasure (s. 159), consequently without notice and without reason assigned (*Hayman v. Governing Body of Rugby School*, 1874, 43 L. J. Ch. 834). He must not be an alderman or councillor or clerk of the peace of the borough, and he must not by himself or his partner be employed or interested directly or indirectly in the prosecution of any offender committed for trial by the justices at the peril of a fine (s. 159). This fine is the penalty for contravention of the section. Interest in a justices' clerk does not vacate the appointment. See JUSTICES' CLERK.

Stipendiary Magistrate.—The council may, if they desire it, obtain the

appointment of a salaried stipendiary magistrate on petition to the Secretary of State (s. 161). Such a stipendiary is a Court of summary jurisdiction, and can act alone where otherwise two justices are required; he cannot act as recorder.

Quarter Sessions and Recorder.—The Queen may also on petition to Her Majesty in Council grant the borough a separate Court of QUARTER SESSIONS (s. 162). In this case the Council is to appoint a fit person to act as clerk of the peace. The Queen may also appoint for a borough having a separate Court of Quarter Sessions a recorder who must be a barrister of five years' standing. The recorder takes precedence next after the mayor. He may be a revising barrister for the borough, but he is disqualified from acting as an alderman or councillor or serving in Parliament for the borough. A recorder is to hold once at least in every quarter of a year a Court of Quarter Sessions in and for the borough. At this Court, which is a Court of record, he sits as sole judge, and takes cognisance of all crimes, offences, and matters cognisable by Courts of Quarter Sessions for counties in England. The municipal council of a borough having a separate Court of Quarter Sessions is liable to pay the costs and expenses attending the prosecution of felonies committed in the borough (s. 169; and see *Ex parte County Council of Kent and Town Councils of Dover and Sandwich*, [1891] 1 Q. B. 389).

Borough Civil Court.—The recorder is to be the judge of the borough civil Court, if any (s. 175). Where the town clerk does not act as a registrar, the council is to appoint a registrar of the borough Court. Such registrar must not practise as a solicitor in the Court. Each borough civil Court is to be holden for trial of issues of fact and law four times at least in each year.

Sheriff.—Where a borough is also a county of itself (see p. 20), the council is on the 9th November in every year to appoint a fit person to execute the office of sheriff. Such a borough-county sheriff has the ordinary duties and powers of a SHERIFF; the law as to which is now to be found consolidated in the Sheriffs Act, 1887.

Borough Juries.—These are regulated by sec. 186 of the Act. Every burgess, unless exempt or disqualified, is liable to serve on grand juries in the borough and on juries for the trial of issues joined either in the Court of Quarter Sessions or in the borough civil Court.

Police.—This department is regulated by what is termed the watch committee—a sub-committee of the municipal corporation (s. 190). It is the function of this watch committee to appoint from time to time a sufficient number of fit men to be borough constables, and to frame regulations for the guidance of the constables and to secure their efficiency—that they shall not, like Dogberry and Verges, “go sit upon the church bench, and then to bed.” A copy of these regulations is to be sent to the Secretary of State.

A borough constable may, while on duty, apprehend any idle and disorderly person whom he finds disturbing the public peace, or whom he has just cause to suspect of intention to commit a felony, and deliver him to the constable in attendance at the nearest watch house, until he can be brought before a justice. Bail may in some cases be taken (ss. 193, 227). A borough constable guilty of neglect or disobedience may be imprisoned, or fined, or dismissed. Assaulting or resisting a borough constable is punishable with a fine not exceeding £5. And see Prevention of Crimes Amendment Act, 1885, s. 12.

Sec. 196 contains provisions for the appointment of special constables

where the ordinary police force is insufficient (see *R. v. Hulton*, 1849, 13 Q. B. 592). The expenses of a police force may, in those boroughs where a watch rate could be levied at the commencement of the Act, be defrayed by levy of a watch rate (s. 197), otherwise they are payable out of the borough fund.

Part X. of the Act deals with the rights of freemen, that is to say, any person of the class whose rights and interests were reserved by the Municipal Corporations Act, 1835.

Legal Proceedings.—These are regulated by secs. 219–227. In summary proceedings for offences and fines under the Act, the information is to be laid within six calendar months after the commission of the offence. Any person aggrieved by a conviction of a Court of summary jurisdiction may appeal therefrom to a Court of Quarter Sessions (see Summary Jurisdiction Act, 1879, s. 31). Fines *prima facie* go to the treasurer of the borough (s. 221). Service of summons or warrant is regulated by sec. 223.

An action to recover a fine from any person for acting in a corporate office without having made the requisite declaration, or without being qualified, is hedged round with various restrictions. It can only be brought by a burgess of the borough; the plaintiff must, moreover, have served notice in writing on the alleged usurper within fourteen days after the cause of action arose, of his intention to sue, and the action must have been commenced within three months after the cause of action arose. The Court require the plaintiff to give security for costs—usually £100—and unless the plaintiff gets judgment, the defendant is to be entitled to his costs, to be taxed as between solicitor and client. If the plaintiff succeeds, he gets a moiety of the fine, which is not to exceed £50. The risk to the informer is therefore great; the reward small.

When a person claims to hold a corporate office improperly, the Crown, as visitor of municipal corporations (see CORPORATION), may inquire by what title or authority he usurps the office. This it does by the proceeding known as *Quo warranto* (*q.v.*). The relator need not be a burgess, but he must be an inhabitant. Applications for an information in the nature of a *Quo warranto* are like actions, hedged in by various safeguards against abuses. The Court has, moreover, always a discretion in granting the writ, and it will be specially cautious where the application is by an individual, and not by the corporation or mayor. Neither will it interfere to try the title where there has been a mere irregularity, without any bad faith, or where to do so would be nugatory, as where the claimant if reinstated might be immediately and legally dismissed—*Lex nihil frustra facit* (*R. v. Ward*, 1872, L. R. 8 Q. B. 210; *Ex parte Richards*, 1877, 3 Q. B. D. 368; *In re Wiseman*, 1888, 3 T. L. R. 12).

Mandamus.—Mandamus is a high prerogative writ conveying a command in the Queen's name to a corporation to do or abstain from doing some particular act, to insert a name in the burgess roll (s. 47 (3)), to elect corporate officers (s. 70 (2)), to admit a freeman (*Bagg's case*, 11 Rep. 94), or to reinstate a recorder or clerk of the peace, and for many other purposes. See MANDAMUS.

Protective Provisions.—Sec. 226 contains provisions for the protection of persons acting under the Act. Thus an action, prosecution, or proceeding against any person for any act done in pursuance or execution, or intended execution of the Act, or in respect of any alleged neglect or default in the execution of the Act, is not to lie or be instituted unless commenced within six calendar months next after the act or thing is done or omitted; and in construing this provision the generality of the word "action" is not

to be restricted (*Harrop v. Ossett (Corporation of)*, 1898, 46 W. R. 391). Tender of amends may be pleaded, and the council may also, if it thinks fit, indemnify the defendant in respect of costs out of the borough fund or borough rate. An action under sec. 224 of the Municipal Corporations Act is not a "proceeding" to which the PUBLIC AUTHORITIES PROTECTION ACT applies (*Humphries v. Worwood*, 1894, 64 L. J. Q. B. 437).

Cinque Ports and Universities.—Special provisions as to the CINQUE PORTS are contained in the Act (s. 248), and also as to the borough of Cambridge (s. 249); and there are saving clauses reserving the rights and privileges of the chancellor, masters, and scholars of the Universities of Oxford and Cambridge (s. 257), the precincts of cathedrals (s. 258), the royal prerogative (s. 259), and other matters.

Petitions for Charters.—The Municipal Corporations Act, 1882, defines what existing towns are to constitute municipal corporations at the commencement of the Act, but the list is not final. The Act reserves power to the inhabitant householders of any town to petition for the grant of a charter of incorporation, and if Her Majesty, by the advice of Her Privy Council, thinks fit by charter to create such town a municipal borough, and to incorporate the inhabitants, Her Majesty may extend to such new borough the provisions of the Municipal Corporations Acts.

There are many considerations to recommend incorporation—government that is by a town council over government by a local board. There is a prestige attaching to incorporation which does not invest a local board. The offices of mayor and alderman are offices of dignity and importance, and the mayor is *ex officio* a magistrate, which the chairman of a local board is not. A municipal corporation possesses also the highly valued privilege of maintaining a police force. It may have, too, a separate Court of Quarter Sessions and a recorder.

The petition for incorporation may be presented by any of the inhabitant householders, and need not, as formerly, be a petition representing a majority of such householders. When presented, it is to be referred to a committee of the Privy Council (s. 211), and the date of consideration by the committee advertised in the *London Gazette*, to enable inhabitants, if so advised, to oppose. If Her Majesty grants a charter, the largest powers are reserved as to fixing by such charter the number of councillors, the number and boundaries of the wards, the time for retirement of the first aldermen and councillors, and for settlement—by a scheme—of the powers, rights, privileges, franchises, duties, property, and liabilities of any then existing local authority, whose district comprises the whole or part of the area of that borough (s. 212). Subject to such provisions in the charter, the Municipal Corporations Act, 1882, is then to apply to the newly created municipality.

Spartan nactus es, hanc exorna. This is the motto of the Municipal Corporations Act, 1882. The system which that Act embodies is statutory in form, but in form only. In substance it is the outcome of Anglo-Saxon characteristics. Law and liberty are happily blended in it, and the result has been that in the municipal borough of to-day we have the evolution of the highest type of local self-government, a type admirably adapted to secure the well-being of the inhabitants, and to train them to discharge the duties of citizenship in a larger and imperial sphere.

As to municipal elections, see ELECTIONS, vol. iv. p. 461.

[*Authorities.*—Arnold's *Law of Municipal Corporations*, 4th ed.; Lumley's *Public Health*, 5th ed.; Glen, *Public Health*; Bryce, *Ultra Vires*, 2nd ed.; Grant on *Corporations*.]

Municipal Council.—This body is the executive of a municipal corporation under the Municipal Corporations Act, 1882. Its constitution and powers are defined by the Act. See MUNICIPAL CORPORATIONS, p. 16.

Municipal Law.—This expression, as now understood, has no reference to the law of municipalities or of local government, but is employed as an equivalent for national or territorial law, as distinguished from international law or usage; *i.e.* it refers to the law which belongs to men as linked to others in some political society, and determines all questions of public and private right within the national jurisdiction (see Holland, *Jurisp.* 117 n, 341). Within the territorial limits of any independent State the municipal or territorial law is supreme, and concession or submission can be made to the claims of external or international law only when the municipal law is silent or does not speak imperatively on the matter which is *sub judice*. There is, however, a judicial inclination where the municipal law is silent, or not express and imperative, to lean against any presumption that the territorial sovereign intended to legislate in defiance of any accepted international rule, or to assume jurisdiction over persons not within the territory, or if without it, not subjects of its sovereign. In the main, the law of England is of a purely territorial character, and does not purport to bind even citizens when outside the territory; and does not adopt the theory of personal law in favour in many Continental States.

Municipal law is said to admit and incorporate international law, so as to bind the sovereign State and its subjects (Cockburn, C.J., quoted by Creasy, *Int. Law*, 158). This is so far true, that the State will be liable to diplomatic amenities, or create a *casus belli* if its subjects, with or without its sanction, infringe international usage to the injury of another State. But it is certainly not true to say that municipal law can be treated as automatically accepting international law, or that the municipal Courts can disregard or invalidate municipal legislation on the ground that it is *ultra vires* as being inconsistent with international law (Wheaton, ed. Boyd, s. 439).

In *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] App. Cas. 670, the Judicial Committee said that “no territorial legislation can give jurisdiction which any *foreign* Courts ought to recognise, against absent foreigners who owe no allegiance or obedience to the Power which so legislates.” This is no declaration against the municipal competence of the territorial sovereign, but only against the international and extra-territorial recognition of such authority. And for forensic purposes it is clear that international law is not part of any national law, except as expressly recognised by legislation or judicial decision (*In re Queensland Mercantile and Agency Co.*, [1892] 1 Ch. 218, 226).

Munitions of War.—The Patents Act, 1883 (46 & 47 Vict. c. 57), provides (s. 44) that the benefit of inventions and patents for instruments or munitions of war may be assigned by the inventor or his personal representatives or assigns to the Secretary of State for the War Department on behalf of the Crown. When such assignment has been made, the Secretary of State, before the patent is applied for or the specification is published, may certify to the Comptroller that it is to the interest of the public service that secrecy should be observed. Thereupon all documents, instead of being left in the ordinary manner at the Patent Office, are to be delivered to the

Comptroller in a packet sealed by authority of the Secretary of State. For other provisions, see sec. 44, subsecs. (5) to (12).

As to supplying munitions of war for the equipment of ships of Powers at war with States with whom England is at peace, see FOREIGN ENLISTMENT; see also CONTRABAND OF WAR; and as to setting on fire and destroying munitions of war, see ARSON.

Murder.

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In the times of the Saxon and Danish kings murder is described by the word "morth" (Ger. *Mord*), which means secret killing; and this view of the word long continued, as appears by Glanville's definition, *Murdrum quod nullo vidente, nullo sciente clam perpetratur præter solum interfectorem et ejus complices* (3 Steph. *Hist. Cr. Law*, 25, 28).

History.—The term "murder" in the Low Latin form *murdrum* first appears in the laws of Edward the Confessor as the name of a fine imposed in favour of the Crown upon any hundred in which a man was slain, unless the hundredors produced the slayer or presented Englishry (Bracton, *de Coronâ*, f. 134 b). After the Conquest, it was levied for the protection of the dominant or Franco-Norman race; and in the interests of the Exchequer a slain man was presumed French until the contrary was proved (1 Pollock and Maitland, *Hist. Eng. Law*, 67, 545). The presentment of Englishry ceased in 1340 (14 Edw. III. st. 1, c. 4). The liability to the fine did not at first depend on the quality of the homicide, for in the early law even homicide by misadventure or in self-defence was so far an offence as to need a pardon, and the only forms of homicide which were not criminal were executing a lawful sentence of death and killing an outlaw or fugitive felon (*ibid.* ii. 476, 477). And traces of this view continue even until 1861 (24 & 25 Vict. c. 100, s. 7). The fine was not incurred in the case of men killed or drowned in the sea (Bracton, *de Coronâ*, f. 121 b). With the growth of central authority and the conception of the king's peace, developed a sense of the seriousness of homicide; and the procedure by presentment and indictment, whether in the interests of order or revenue, gradually superseded the remedy by appeal, until homicide became the most important plea of the Crown, and was punished as a capital felony. Of the original notion there still remains a remarkable trace in the rule of law that every killing is *prima facie* murder (Fost. *Cr. Law*, 255; Steph. *Dig. Cr. Law*, 5th ed., art. 251). This is in all probability a misapprehension of the presumptive rule (already stated with reference to the liability for the murder fine) that the person killed was a man in respect of whom it was payable. But it may also be explained by reference to the rule in trespasses and assaults that when the fact is proved, it is for the defendant or accused to justify, explain, or excuse it; and but for the rule of *actio personalis moritur cum personâ* every murder would involve an action for trespass to the person. In the early English law, as in that of other Scandinavian or Teutonic, and indeed of most peoples, when a man was killed, the niceties of the slayer's motive were not examined. The lord lost his man and the relatives of the deceased their kin, and the natural impulse of the latter was to raise a blood-feud and of the former to demand

compensation for the loss of his subject. This stage in early law was represented by the blood-wite to the king or lord of the slain. The murder fine indicates a further development or communal liability to the sovereign where a manslayer was not surrendered to justice. But the liability of the slayer and of the hundred in which the death happened in no sense originally depended on the question whether the killing was deliberate or accidental or excusable, and when the slayer was produced for justice the claim of the Crown was no bar to the claims of the next-of-kin, which could be met only by trial by battle or by paying (1 Steph. *Hist. Cr. Law*, 248).

Till the end of the fifteenth century manslaughterers were brought to justice by appeal rather than by indictment or presentment (1 Steph. *Hist. Crim. Law*, 248). The substitution of indictment for appeal as the regular remedy in homicide is traceable to a statute of 1487 (3 Hen. VII. c. 1), and may be regarded as a step in the strengthening of the central authority which followed on the substitution of the personal government of the Tudors for the anarchy of the Wars of the Roses. But this substitution did not until 1819 defeat the rights of the next-of-kin to appeal the slayer, even if he were acquitted on indictment (*Ashford v. Thornton*, 1818, 3 Barn. & Ald. 405; 19 R. R. 349. See APPEAL OF FELONY; BATTLE, TRIAL BY).

But concurrently with the development of prosecution on indictment there was also a growth in the law with reference to the murder fine. In 1267 (52 Hen. III. c. 25) it was provided that the fine should not be exacted when the death was caused by misadventure; but this did not make such killing not felony; for in 1278 (6 Edw. I. c. 9) it was found necessary to enact that writs should not be granted out of the Chancery (the writ *de odio et atia*) to inquire whether a death was caused by misadventure or in self-defence or in other manner by felony; and a procedure by special verdict and pardon was substituted.

And the distinction now drawn between wilful murder and manslaughter first clearly emerges in 1531 (23 Hen. VIII. c. 1, s. 3), when benefit of clergy was taken away in cases of "wilful murder of malice prepensed" (see also 1 Edw. VI. c. 12), and in 1532 (24 Hen. VIII. c. 5), when killing in CHANCE MEDLEY was visited by minor punishment.

The term "malice prepense" or malice aforethought (*malitia præcogitata*) was not, however, then new, for it occurs in Acts of 1389 (13 Rich. II. st. 2, c. i.) and 1497 (13 Hen. VII. c. 7) (see 3 Steph. *Hist. Cr. Law*), and in other Acts of Henry VIII. This indicates that a distinction was thus drawn between deliberate and malignant homicide and homicide by misadventure or in self-defence; but it is clear that up till the sixteenth century the plea that the homicide was by misadventure or in self-defence was not a defence to the indictment (which was founded on the taking of the life of a person within the king's peace), but a plea in mitigation of punishment, and that while pardons in such events were granted almost as of course on the report of the judges, they were strictly limited to such cases of homicide; and during that period the only defence to a charge of homicide was justification, *i.e.* that the accused, acting for the king in the assertion of public justice, had slain the deceased.

Henry VIII. dealt with poisoning as treason, but it was in 1547 (1 Edw. VI. c. 12) relegated to its original position as a form of wilful murder (3 Steph. *Hist. Cr. Law*, 45). From that date no statutory change has been made in the definition of wilful murder, and its punishment continues to be capital as then, with the one change that the judge must now pronounce sentence of death and may not merely direct

that it be recorded (24 & 25 Vict. c. 100, s. 2). The Statute of Treasons, 1351, besides defining high treason, had also described certain forms of homicide as petty treason, viz. those which consisted in killing a person to whom the slayer owed a special duty, as of wife to husband, servant to master, or priest to bishop. This offence was completely merged in murder in 1828 (9 Geo. IV. c. 31) by a provision needlessly re-enacted in 1861 (24 & 25 Vict. c. 100, s. 8) (see 3 Steph. *Hist. Cr. Law*, 34).

Except for a few provisions relating to procedure, and the trial of certain murders committed by British subjects out of England (24 & 25 Vict. c. 100, ss. 9, 68), the whole history of the crime of murder as now understood rests on the glosses of judges and text-writers, as to what constitutes the presence or absence of malice aforethought, so as to make the homicide necessarily capital or less severely punishable.

Malice aforethought was certainly at first construed as meaning "with deliberately formed intention" or "in cold blood," and was distinguished from killing on sudden impulse, or sudden provocation, or in chance medley (see 1604, 2 Jas. I. c. 8). This is what is curiously termed malice in fact, *i.e.* actual and express and calculated ill-will; and the history of the form of homicide known as wilful murder has from the sixteenth century consisted in the extension of malice aforethought so as to include within murder a number of forms of homicide in which express and specific deliberation exists not in fact, but in law, *i.e.* in the intention of the judges and not in the mind of the accused.

Sir James Stephen has fully traced and criticised this development (3 *Hist. Cr. Law*, 18-77; *Dig. Cr. Law*, 5th ed., 407), and in this article it is impossible to do more than indicate that source of information and state the result of judicial effort.

The offence *as now punished* consists in the killing of any human being without legal justification or excuse, whether the killing is done directly or indirectly, and whatever the means used (1 Hale, P. C. 431), other than false or perjured accusation before a judicial tribunal (*R. v. Macdaniel*, 1755, Fost. *Cr. Law*, 121).

As a general rule, the killing must be in consequence of an act or misfeasance, and not of an omission or nonfeasance, except in the case of deliberate abandonment or neglect of a helpless infant or person to whom the accused owed the duty of care (*R. v. Waters*, 1848, 18 L. J. M. C. 53).

But to justify conviction it must be proved—

(1) That the accused meant to kill the deceased or some other person; or

(2) That the accused meant to do to the person killed or to some other person some bodily injury of a nature likely to cause death, whether he did or did not mean to hurt the deceased; or

(3) That the accused caused the death by an act done in the prosecution of an unlawful purpose (*e.g.* abortion), and of such a nature as to be likely to endanger human life, whether he did or did not mean to hurt any person (*R. v. Serné*, 1887, 16 Cox C. C. 311); or

(4) That the accused meant to cause grievous bodily harm to some person for the purpose of enabling himself to commit a felony, or to facilitate the escape of another who had committed (or attempted to commit) a felony; or that the accused administered or caused to be administered any stupefying or overpowering or poisonous thing to the deceased, or wilfully choked or strangled him, whether he did or did not mean to cause death, or did or did not know that it was likely to result from his act; or

(5) That the accused in causing the death intended to resist an officer of criminal or civil justice in the execution of his duty.

Wherever the homicide is committed under these circumstances it is treated as in law committed with "malice aforethought," so as to make it "wilful" murder.

(1) This is the ordinary case of deliberate homicide, extended to cases where a man uses a weapon with murderous intent but misses the man he meant to kill and kills another whom he did not mean to kill (*Fost. Cr. Law*, 261), or where he prepares poison for one man which is taken with fatal effects by another (1 Hale, P. C. 436).

(2) The second head covers cases of fighting where the intent is hostile but not to cause death, and cases where a blow aimed at the opponent takes fatal effect on a peacemaker or bystander. The enormity of the offence is cut down where the fight is on a sudden quarrel or provocation, and there is no evidence of deliberate intention to kill (*R. v. Mawgridge*, 1708, 9 St. Tri. 61; and see DUEL) (*Archb. Cr. Pl.*, 21st ed., 722).

(3) (4) Heads (3) and (4) in substance mean that where a man is engaged in committing a felony and to complete his purpose or to avoid arrest kills another, the law shifts the felonious intent from the particular felony he was primarily engaged in to the homicide which he incidentally commits. This form of murder is certainly "constructive," and the weakness of the doctrine is illustrated by the criticism of Stephen, J., in *R. v. Serné*, 1887, 16 Cox C. C. 311, on the old case given by Hale, that a man who shoots at poultry meaning to steal them and kills their owner is a murderer; and there is great force in the view that this form of murder should be confined to responsibility for felonious acts involving obvious danger to human life.

There are some dicta (*e.g.* 3 *Co. Inst.* 57) that "recklessly doing an act such as throwing rubbish into a crowded street might amount to murder, or purposely drive furiously through a crowd" (1 Hale, P. C. 475), but at the present time such acts are treated as manslaughter only.

(5) To bring the slayer within the fifth rule, he must know that the person slain is an officer of the law, or is a private person lawfully acting to effect arrest. It is the duty of all persons to assist in capturing traitors and felons, and this rule exists in aid of such duty. If the proposed arrest is absolutely and obviously illegal, the slayer is undoubtedly entitled to resist, and if death ensues in such resistance the offence would at worst be reduced to manslaughter. But the tendency of modern decisions is to limit the right of resistance and to require the person sought to be arrested to submit for the time, and to let a judge deal with the legality of the arrest (*R. v. Marsden*, 1867, L. R. 1 C. C. R. 131; and see *Archb. Cr. Pl.*, 21st ed., 736-742; and *R. v. Allen*, 1867, reported in *Steph. Dig. Cr. Law*, 5th ed., 414, the case of the killing of constables to rescue persons who were in fact illegally in custody).

Every killing of a human being having always been in England treated as presumably unlawful and as amounting to wilful murder, consideration of what will remove the presumption has fallen under four heads:—

(a) Were the circumstances such as to justify the killing so as to make the killing not merely no murder but no felony?

(b) Were the circumstances such as to excuse the killing, such as to negative not only malice aforethought but any unlawful act or motive, such as to make the act no felony, but an act done by misadventure or in self-defence?

(c) Were the circumstances such as to make the killing, though not

premeditated in the eye of the law, still unjustifiable and inexcusable, *i.e.* culpable and felonious, *i.e.* MANSLAUGHTER ?

(d) Was the accused sane at the time when he slew the deceased ?

(a) The killing of a man can be justified only in the cases—

(i.) Of execution of lawful sentence of a competent Court.

(ii.) When an alien enemy is killed in war.

(iii.) When a fugitive, traitor, or felon cannot otherwise be stopped or arrested by the officers of the law or private persons in exercise of their public obligation to pursue and arrest, or when the arrest is resisted by such force as to make killing necessary in self-defence.

(iv.) Of dispersing a riotous or rebellious assembly (see RIOT).

(b) The excuses which deprive homicide of its criminal quality (see 24 & 25 Vict. c. 100, s. 7) are—

(i.) Misadventure.

(ii.) Self-defence.

The first of these arises when the fatal injury was caused by pure accident without culpable negligence. If there is any negligence which can be called culpable, the homicide is felonious, but is manslaughter and not murder.

The doctrine of excuse by self-defence extends to all cases in which the accused reasonably believed that the act causing death was necessary for his own defence, or that of a relative, or, indeed, of any person threatened unlawfully with death or grave injury by another, or in the defence of his home against burglars (see BURGLARY), or of his person and property from highway robbery, or other felony involving force or grave danger such as arson or rape (Archb. *Cr. Pl.*, 21st ed., 728). There is not, in case of defence of home, any duty to retreat before the assailant. See Archb. *Cr. Pl.*, 21st ed., 728 ; BURGLARY.

The plea of provocation is so far an excuse as to reduce the offence from murder to manslaughter, but does not deprive the fatal act of its criminal quality. See MANSLAUGHTER.

Both in the case of self-defence and provocation the test of liability is in the main subjective, *i.e.* the quality of the act is judged by the circumstances whether facts or fancies which were present to the mind of the slayer. If the danger or the provocation were to a reasonable mind purely imaginary, the proper conclusion apparently is not that the accused is guilty of the full crime, but that he was mentally irresponsible for its commission. See LUNACY, vol. vii. at p. 51.

Punishment.—On a valid conviction of murder, the Court has no alternative but to pass sentence of death, and to direct the burial of the body of the convict within the prison where the execution takes place (24 & 25 Vict. c. 100, ss. 2, 3). See CAPITAL PUNISHMENT.

Subsidiary and Ancillary Offences.—Attempts and conspiracies to commit a felony are at common law merely misdemeanours ; but the gravity of the crime of murder has led to various statutory provisions for the punishment of such attempts.

The Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), contains five sections (11–15) punishing as felonies attempts to commit murder—

(a) By poison or wounding.

(b) By destruction or damage of buildings by explosives.

(c) By setting fire to ships or vessels.

(d) By attempting to administer poison, or by shooting or aiming a firearm, even if the discharge is prevented (*R. v. Duckworth*, [1892] 2 Q. B. 83).

(e) By any other means.

The punishment for all is penal servitude for life or not less than three years, or imprisonment with or without hard labour for not over two years. In the case of offence (a) by wounding, the accused, if the intent is not proved, may be convicted of unlawful wounding (14 & 15 Vict. c. 19, s. 5; 24 & 25 Vict. c. 100, s. 20; *R. v. Ward*, 1871, L. R. 1 C. C. R. 356; *R. v. Martin*, 1882, 8 Q. B. D. 54; and see BODILY HARM).

As to letters threatening to murder, see MENACES.

Conspiracy to murder was made felony in 1861 (24 & 25 Vict. c. 100, s. 4), and in consequence of *R. v. Bernard*, 1858, 1 F. & F. 240, was extended to conspiracies and incitements in England or Ireland to commit murder, within or without the Queen's dominions.

Accessories before or after the fact to murder are in precisely the same legal position as accessories to any other felony; and persons present, aiding and abetting in murder, even if they do not strike the fatal blow, are liable to sentence and execution as principals. See Bracton, *de Coronâ*, f. 121; ACCESSORY.

Trial and Procedure.—Courts of Quarter Sessions cannot try murder or the cognate offences (5 & 6 Vict. c. 38, s. 1).

Venue.—The place for trying murder is ordinarily the place where the fatal injury was done. Where a man is injured in one jurisdiction and dies in another, the trial may take place in either (7 Geo. IV. c. 64, s. 12).

Murder in the Admiralty jurisdiction is triable, wherever the accused is in England, in the following cases:—

(1) Where it took place on a British ship, or by a person who is, or has within three months previously been employed on such a vessel. It is triable wherever the accused is apprehended or in custody (24 & 25 Vict. c. 100, s. 68; 57 & 58 Vict. c. 60, s. 687; *R. v. Anderson*, 1867, L. R. 1 C. C. R. 161; *R. v. Dudley*, 1884, 14 Q. B. D. 273; Steph. *Dig. Cr. Law*, 5th ed., p. 28). It is immaterial whether the accused is or is not a British subject.

(2) And where the injury was done on the sea or on foreign soil, and the death took place in England, or *vice versa*, the offence is triable as murder or manslaughter in the jurisdiction in England where the injury or death occurred (24 & 25 Vict. c. 100, s. 10).

(3) Where the act is done by a British subject *on land* outside the United Kingdom, it is triable wherever the accused is apprehended or in custody in England (24 & 25 Vict. c. 100, s. 9), subject, in the case of another part of the British Empire, to the right to try him where the offence was committed, or to surrender him as a colonial fugitive, or, in the case of a foreign country, to surrender him for extradition.

A British sailor cannot be tried in England for murder committed by him on a foreign ship to which he belongs. But the jurisdiction of English Courts extends to murders from or on foreign ships in our territorial waters (41 & 42 Vict. c. 73); and murder by a British subject on a foreign ship on the high seas, or in a port or harbour, is triable in England if the offender was not part of the crew of the ship (57 & 58 Vict. c. 60, s. 686).

Indictment.—The indictment for murder is now drawn in a very simple form, it having been since 1851 (14 & 15 Vict. c. 100, s. 4) unnecessary to describe the manner and means by which the offence was committed (24 & 25 Vict. c. 100, s. 6). It runs thus—

Kent to wit. The jurors for Our Lady the Queen on their oath present that A. B. on the day of feloniously, wilfully, and of his malice aforethought, did kill and murder one C. D., against the peace, etc.

The jury, if the facts so warrant, may on this indictment negative the words in italics, and convict of manslaughter.

Where the offence was committed in the Admiralty jurisdiction, the words "on the high seas" are inserted in the indictment, and in order to establish jurisdiction it is prudent to specify the British ship on which the act was done, or some facts showing the act to have been done within the jurisdiction of the Court; and where the act was done on land outside the United Kingdom, it is prudent but not essential to allege the accused to be a British subject (see *R. v. Jameson*, [1896] 2 Q. B. 425).

The indictments of accessories before the fact to murder state the principal offence in the above form, and go on with—"And the jurors aforesaid, on their oath aforesaid, do further present that E. F., before the said felony and murder was committed, to wit, did feloniously and maliciously incite, move, procure, aid, counsel, hire, and command the said A. B. to do and commit the said felony and murder against," etc.

The only difference made is that, when the principal is not being tried with the accessories, the words "against the peace," etc., are omitted in the statement of the principal offence.

Evidence.—It is necessary to prove the death of the person alleged to have been murdered—(1) by direct proof that his dead body has been found; (2) by the very strongest circumstantial proof if the body cannot be found, *e.g.* in a case of cannibalism. See DEATH, PROOF OF.

It is also necessary to prove that the death occurred within a year and a day from the act of the accused which is said to have caused it. This, while obviously a rough rule to test the relation of direct cause and effect, has not in any way been varied by modern statutes or decisions. Subject to these qualifications and the technical rule that the onus of proof is on the defence when the fact of the killing by the accused is established, the rules of evidence are the same as in other cases.

[*Authorities.*—3 Steph. *Hist. Cr. Law*, 1–107; Steph. *Dig. Cr. Law*, 8th ed.; Archb. *Cr. Pl.*, 21st ed.; Russell on *Crimes*, 6th ed.; Hawk., P. C. bk. i. c. 31; Mayne, *Ind. Cr. Law*, 1896, p. 586; Bracton, *de Coronâ*, ff. 121, 134.]

Muriatic Acid Gas.—See ALKALI WORKS.

Museums and Gymnasiums.—By the Museums and Gymnasiums Act, 1891, which may be adopted for urban districts, either in whole or so far as it relates to museums only or gymnasiums only (s. 3), urban authorities may provide and maintain museums for the reception of local antiquities or other objects of interest, and gymnasiums with all the apparatus ordinarily used therewith, and may erect any buildings, and generally do all things necessary for the provision and maintenance of such museums and gymnasiums (s. 4). A museum so provided must be open to the public not less than three days a week free of charge, but, subject thereto, local authorities may charge fees for admission, and may grant the use of the museum or rooms therein for lectures, exhibitions, or for any purpose of education or instruction (s. 5). Gymnasiums provided under the Act are to be open to the public free of charge for not less than two hours a day during five days in every week (s. 6). Regulations and by-laws may be made (s. 7). The expenses of maintaining such museums and gymnasiums are, so far as not paid by fees and other moneys received under

the Act, to be defrayed as part of the general expenses of the execution by urban authorities of the Public Health Acts (s. 10); authorities are given borrowing powers (*ibid.*); and land may be acquired for the purposes of the Act (s. 11). Where it appears to an urban authority that a museum or gymnasium which has been established under the Act for seven years or upwards is unnecessary or too expensive, such authority may, with the sanction of the Local Government Board, sell the same for the best price obtainable (s. 12). The Act does not extend to Scotland or to the administrative county of London (s. 2). See GYMNASIUMS; LIBRARIES.

Mushrooms.—In *Gardner v. Mansbridge*, 1887, 19 Q. B. D. 217, it was held that the picking of wild mushrooms was not doing wilful or malicious damage within sec. 52 of the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97). But in the case of cultivated mushrooms, destruction or damage with intent to destroy is punishable under secs. 23 and 24 of the Act. At common law mushrooms, being part of the realty, cannot be stolen, but under secs. 36 and 37 of the Larceny Act, 1861, theft or destruction with intent to steal is punishable, where the mushrooms are growing in gardens, nursery grounds, and the like, or where, if cultivated, they are growing in any other land.

Music and Dancing Licences.—See DANCING HOUSE; PUBLIC ENTERTAINMENT.

Music, Copyright in.—See COPYRIGHT.

Mustard.—Mustard, though strictly speaking a condiment, appears to be treated as an article of food within the Acts relating to the Sale of Food and Drugs (*Sandys v. Markham*, 1876, 41 J. P. 52; *Goldsmith v. Maddaford*, 1882, 46 J. P. 44), and not to fall within the decision in *James v. Jones*, [1894] 1 Q. B. 304, which excluded baking powder and like commodities from the scope of the Acts. See ADULTERATION; FOOD.

Mute of Malice.—See ARRAIGNMENT.

Mutilation.—1. A human being may not consent to being maimed (see MAYHEM) or mutilated except in cases of surgical necessity (*Steph. Dig. Cr. Law*, 5th ed., 224–227); and it has been held to be an indictable misdemeanour for a man to mutilate himself to avoid enlistment or impressment, or to show himself as an object of charity (2 Russ. on *Crimes*, 6th ed., 459). See BODILY HARM; MAYHEM.

2. The mutilation of animals by persons other than their owners is punishable under the Malicious Damage Act, 1861 (see 2 Russ. on *Crimes*, 6th ed., 794, 976; DOGS; MALICIOUS DAMAGE). Their mutilation even by their owners, if attended by cruelty or unnecessary suffering, is punishable under the Prevention of Cruelty to Animals Acts, except in those cases in which the operator falls within the protection of the Vivisection Act. See ANIMALS; VIVISECTION.

But such operations as castration or spaying are not within the scope of this Act (see *Lewis v. Fermor*, 1887, 18 Q. B. D. 532). Whether dishorning is cruelty is a matter on which Irish, Scotch, and English Courts differ (*Ford v. Wiley*, 1889, 23 Q. B. D. 203). Cutting dogs' tails and ears or cocks' combs is within the statute (*Murphy v. Manning*, 1877, 2 Ex. D. 307; *Yates v. Higgins*, [1896] 1 Q. B. 166).

3. Mutilation of documents, if done with intent to steal or defraud, is punishable under the Larceny Act, 1861. See LARCENY. In cases not dealt with by this Act mutilation may be punished under the general sections of the Malicious Damage Act, 1861 (see MALICIOUS DAMAGE), and under many Acts affecting particular documents, or may be the subject of civil action.

Mutiny.—The offence of mutiny is not defined in any statute, but it implies collective insubordination, or combination on the part of two or more persons, subject to military law, to resist the lawful authority of superior military or naval officers, whether by violence or passive resistance; or to induce others to resist such lawful authority. It is thus either (1) the overt act of insubordination, or (2) the combination which may or may not have resulted in such overt act, or (3) a combination to induce others to insubordination.

It may be a matter for discretion whether a charge shall be made of insubordination or mutiny; according to the strength of the evidence of the combined design to resist authority. The resemblance the offence of mutiny bears to the crime of conspiracy is apparent, and the evidence necessary to prove it is of the same character (see CONSPIRACY).

Mutiny, sedition, and desertion were the first offences which were authorised to be punished by military law (*q.v.*) under the original Mutiny Act in 1689 (1 Will. & Mary, c. 5). The similar enactment as regards the navy dates from the time of the naval code established soon after the Restoration.

The provisions as to mutiny are contained in the Army Act, 1881 (44 & 45 Vict. c. 58), s. 7; and the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109), and Naval Discipline Act, 1884 (47 & 48 Vict. c. 39), ss. 10–16). Under the provisions of the former Act the charge is not as it is under the latter Acts, a general charge of mutiny, but must be laid as one of the specific offences in relation to mutiny set out in sec. 7. It enacts that every person subject to military law shall, on conviction by court-martial, be liable to suffer death, or such less punishment as in the Act mentioned (see s. 44), if he commits any of the following offences:—(1) Causes, or conspires with any other persons to cause, any mutiny (or sedition (*q.v.*)) in any forces belonging to Her Majesty's regular, reserve, or auxiliary forces, or navy; (2) endeavours to seduce any person in such forces from his allegiance, or to persuade him to join in any mutiny or sedition; (3) joins in or, being present, does not use his utmost endeavours to suppress any mutiny or sedition; (4) delays to inform his commanding officer of any mutiny or sedition coming to his knowledge.

The corresponding provisions in the Naval Discipline Act are so worded that they enable a charge of mutiny to be laid generally. Sec. 10 enacts, "Where mutiny is accompanied by violence, every person subject to the Act who shall join therein shall suffer death, or such other punishment as is hereinafter mentioned." Where a mutiny is not accompanied with violence, the ringleader or ringleaders shall suffer death or such other

punishment as thereafter provided (s. 11). Other sections relate to incitement to mutiny, concealing mutinous designs, etc.

In both the military and the naval law the former offence of mutinous conduct, which was in fact wanting in the element of combination which is the mark of mutiny, is now the offence of insubordination. It is dealt with in secs. 7 and 9 of the Army Act, and 17 and 18 of the Naval Discipline Act. Any insubordinate act which could not be charged under those sections would be chargeable as an offence prejudicial to good order and discipline.

By the Act 37 Geo. III. c. 70, everyone commits felony, and is liable upon conviction to penal servitude for life, who maliciously and advisedly endeavours to seduce any person serving in Her Majesty's forces by sea or land from his duty and allegiance; or to incite or stir up any such person to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatever.

Under sec. 190 of the Army Act and sec. 49 of the Naval Discipline Act, all armed rebels, armed mutineers, and pirates are deemed to be enemies within the Acts; so that offences which have a special character when committed in presence of the enemy, or which consist of dealings with the enemy, have that character when committed in connection with the classes of persons mentioned.

As to mutiny on board merchant vessels, see CREW; PASSENGERS (SEA).

See ARMY; COURTS-MARTIAL; MILITARY LAW; MILITARY OFFENCES; MILITIA; NAVY; RESERVE FORCES; VOLUNTEERS; YEOMANRY.

[*Authorities.*—Clode, *Military and Martial Law*; Simmons, *Courts-Martial*; *Manual of Military Law*, War Office, 1894.]

Mutiny Act.—See ARMY.

Mutual Credits.—See BANKRUPTCY, vol. i. p. 517.

Mutual Debts.—See DEFENCE AND COUNTERCLAIM; SET-OFF.

Mutual Insurance.—See MARINE INSURANCE.

Mutuality.—There must be reciprocity of assent between the parties to a contract, and in that sense it is true that there must be mutuality in a contract; but there need not necessarily be mutuality in the sense of reciprocity of obligation; for example, an agreement within the Statute of Frauds will bind the party signing it although he may be unable to sue the other party to the agreement who has not signed (Broom, *Common Law*, 9th ed., pp. 300, 301). See CONTRACT.

Mutual Promises.—Mutual promises are consideration for one another. See CONTRACT.

Mutual Testament—A will made by two persons, each leaving his or her effects to the other. In a recent case where a husband and wife had executed a mutual testament by which each left his or her effects to the other spouse, and then bequeathed a number of legacies, the Court, upon the death of the wife, granted probate of so much only of the instrument as became operative upon her death (*In the goods of Piazzis-Smyth*, [1898] Prob. 7). See WILL; PROBATE.

Mutus et surdus.—See ARRAIGNMENT.

Mutuum—A loan of personal chattels to be consumed by the borrower, he being bound to restore to the lender, not the same things, but others of the same kind (Story, *Bailments*, s. 283).

My.—The use of the pronoun “my” in the description of a thing given by will is not sufficient evidence of an intention, within the meaning of sec. 24 of the Wills Act, 1837, that the will shall not speak as from the date of the testator’s death (Dart, *Vendors and Purchasers*, 6th ed., vol. i. p. 309; see also Stroud, *Jud. Dict.*).

Name.—See CHRISTIAN NAME; SURNAME; NAME AND ARMS CLAUSE; DIVORCE, *Divorced Wife, Name of*, vol. iv. 326; and Stroud, *Jud. Dict.*

Name and Arms Clause is the name commonly given to a clause whereby a testator or settlor imposes upon the successive takers of an estate an obligation to assume his name and bear his arms.

The clause requires the utmost nicety in framing (*Co. Litt.* note on 327 *a*). It usually, though not necessarily (*In re Cornwallis*, 1886, 32 Ch. D. 388), deals with real estate, providing that a person becoming entitled in possession (*Langdale v. Briggs*, 1856, 8 De G., M. & G. 391; *In re Finch*, 1880, 28 W. R. 903; *In re Varley*, 1893, 62 L. J. Ch. 652) to the estate as tenant for life, or tenant in tail by purchase, shall take and continue to use the name of “Noakes,” and shall assume and continue to bear the arms of Noakes, and that upon non-compliance with this condition within a certain period, the estate limited to the person so failing compliance shall cease as if he were dead, and the ulterior limitations shall take effect.

The following points require attention in the framing of a name and arms clause:—

1. The exact event upon which the obligation to take the name and arms is to arise must be clearly indicated, and also the period allowed for compliance (see the above cases and *Leslie v. Rothes*, [1894] 2 Ch. 499). The clause should be so worded that it can operate as often as necessary, and not so as to be spent in one operation.

2. It must be considered whether a forfeiture, if incurred, is to destroy

estates limited to the children of the person incurring the forfeiture, or only his own estate; or, in other words, whether the limitation over is to be as if he were dead, or as if he were dead without issue (*Hawkins v. Luscombe*, 1818, 2 Swans. 375).

3. The effect of a forfeiture on powers of jointuring and charging portions exercised by the person incurring the forfeiture must be considered; unless otherwise provided, the effect would be to accelerate the coming into possession of the interests appointed.

4. If any person succeeding to the estate is likely to be a peer of the realm the clause requires modification, as a peer, though he might take the name, could hardly be said to use it.

5. The clause should direct that the name is to be used as a surname (*Bennett v. Bennett*, 1864, 2 Drew. & Sm. at p. 276); solely and not as part of a double-barrelled name (*D'Eyncourt v. Gregory*, 1875, 1 Ch. D. 441), and that the name must continue to be used (*Blagrove v. Bradshaw*, 1858, 4 Drew. 230; *In re Farrar*, 1887, W. N. 202).

6. The clause should show whether a simple assumption of the name is to suffice, or whether a Royal Licence is to be sought for or other solemnity observed (*Lowndes v. Davies*, 1835, 1 Bing. N. C. 597).

7. It appears that an unauthorised assumption of the arms would not usually be a compliance with the condition (*Austen v. Collins*, 1886, 54 L. T. 903; *Bevan v. Mahon Hogan*, 1893, 31 L. R. Ir. 342). It is well, therefore, to provide for the possibility of failure to obtain the grant. The clause should state whether the arms are to be borne solely or quarterly.

8. The clause, while exempting persons already bearing the name and arms from the obligation to assume them, should impose the condition as to *continuing* to bear and use them.

9. The clause should impose the obligation upon the husband of a female tenant for life or in tail, though in this case the forfeiture clause will require careful consideration, as it might not always be desirable that the husband should have the power of forfeiting his wife's estate.

10. The clause should provide for the case of the person succeeding to the estate being an infant.

[See as to whether an infant can "refuse or neglect" to comply with a condition (*Partridge v. Partridge*, [1894] 1 Ch. 351.)]

11. The condition cannot be imposed upon a tenant in fee-simple (*Musgrave v. Brooke*, 1884, 26 Ch. D. 792), and if in defeasance of an estate tail will be destroyed by a disentailing deed (*Milbank v. Vane*, [1893] 3 Ch. 79; *In re Cornwallis*, 1886, 32 Ch. D. 388).

12. Infringement of the rule against PERPETUITIES must be guarded against.

13. The usual form of the clause gives a year for compliance with the condition. This is exclusive of the day on which the estate commences (*Riggs Millar v. Wheatley*, 1891, 28 L. R. Ir. 144). Ignorance of the existence of the condition will not excuse non-compliance with it (*Astley v. Essex*, 1874, L. R. 18 Eq. 290).

14. The Court will not, at the suit of an encumbrancer, grant an injunction restraining a tenant for life from incurring a forfeiture under this clause (*Semple v. Holland*, 1863, 33 Beav. 94).

[Precedents will be found in Davidson's *Conveyancing Precedents*, vol. iii.]

Named primarily means *nominatim*; in a secondary sense, means "referred to." See Stroud, *Jud. Dict.*, and *Jodrell v. Seale*, 1889, W. N. 230. As to "expressly named," see WARRANT OF ATTORNEY.

Namely.—As to "namely," "including," and "to wit," see WILL, *Judicial Glossary*, and Stroud, *Jud. Dict.*

Namium vetitum.—See REPLEVIN.

Narrow Channel.—See PILOTAGE.

Natal.—A British colony on the south-east coast of Africa, which takes its name from Port Natal, discovered by Vasco da Gama on Christmas Day, 1497. The Dutch formed a settlement in 1721, but soon abandoned it. In 1837 a large body of Dutch Boers migrated from the Cape Colony to Natal; in 1842 the Governor of the Cape took possession; the district was proclaimed a British colony in 1843, and added to Cape Colony in 1844. Ordinances were passed introducing the Roman-Dutch law (*q.v.*) and providing for the administration of justice. In 1845 Natal became a separate Government; in 1847 it obtained a Legislative Council; in 1856 it was erected into a separate colony. Responsible government was established by the Constitution Act, 1893. Executive authority is intrusted to a Governor, who acts on the advice of his Ministers. The Legislature consists of the Governor, a Legislative Council of eleven members, and a Legislative Assembly of thirty-seven elected members. The Supreme Court now includes the Chief Justice and three puisne judges; the final appeal is to the Queen in Council (see the Order in Council of 19th July 1870 (Hertslet's *Treaties*, xiii. 1191) and the article PRIVY COUNCIL). In Natal, as in Cape Colony, the Roman-Dutch law has been to some extent modified by legislation; and English cases are commonly cited and followed.

The Governor of Natal is also Governor of Zululand (*q.v.*).

[*Authorities.*—Colonial Office List; Natal Laws; Natal Law Reports.]

Nation (from *natus*, born)—The inhabitants of a territory united under the same Government, and possessing as a whole an independent status. The word is generally but inaccurately used as a synonym of State (*q.v.*). International law is properly the law between nations, treated as independent unities; but owing to the somewhat vague way in which the word "nation" has been applied to persons of the same race, owing allegiance to different Governments (*e.g.* Germany and Italy before their unification), writers on international law prefer the term "State" to describe independent communities. The nation differs from the State in being the general body of which the State is the directing organism.

National Church.—See CHURCH OF ENGLAND, vol. iii. at p. 12.

National Debt.

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PRELIMINARY.

Definition and General Principles.—National Debt is a term used to denote the pecuniary liabilities of a nation, collectively, to those who stand towards it in the relation of lender. Loans, either to meet war expenses, to carry on great public undertakings, or to make up the recurrent deficits of a mismanaged revenue, are what constitute National Debt proper (*Encyc. Brit.*, 9th ed., vol. xvii. tit. "National Debt"). It is so universal an institution that it has been described as the first stage of a nation towards civilisation (*ibid.*, and see Southey's *Sir Thomas More*; or, *Colloquies on the Progress and Prospects of Society*, 2nd ed., vol. i. pp. 180 *et seq.*). This opinion does not, however, find general acceptance (see Adam Smith's *Wealth of Nations*, M'Culloch's edition, p. 421; Mill's *Political Economy*, vol. i. pp. 94 *et seq.*; Blackstone's *Commentaries*, vol. i. p. 327; Stanley's *Life of Arnold*, 6th ed., p. 153 n. (a), and p. 233), though it seems reasonable to hold that it is often better for a Government to require its subjects to bear, *permanently*, the *interest* on a loan instead of paying all at once the equivalent to the *principal* (Mill's *Political Economy*, vol. i. pp. 96 *et seq.*, and vol. ii. pp. 465 *et seq.*; Devas's *Political Economy*, pp. 533 *et seq.*), especially if the object of the loan be calculated to benefit posterity (see Stephen's *Commentaries*, 11th ed., p. 587). At all events, the weight of intrinsic objections to public borrowing must, it stands to reason, depend greatly upon the purposes for which a debt is contracted (Palgrave's *Dictionary of Political Economy*, tit. "Debts, Public"). Amongst the principal causes of public borrowing are temporary necessity, special emergency, and the construction of public works (*ibid.*). Under a constitutional Government, the only alternative to public borrowing is increase of taxation (*ibid.*), and where such an alternative is not possible, the only economically sound method of meeting expenses which exceed the ordinary resources of a State, is by borrowing in the open market on the most advantageous terms obtainable (*Encyc. Brit.*, 9th ed., vol. xvii. tit. "National Debt"). Forced loans, as a means of raising money for public purposes, engender discontent, and do not, in the long run, prove efficacious; while even voluntary loans, if issued at a price much below *par*, though at a comparatively low rate of interest, must, whilst largely increasing the permanent national burdens, yield in times of emergency but a poor return in cash for the liability incurred (see M'Culloch's *Commercial Dictionary*, new ed., tit. "Funds"). Public loans are either *perpetual* or *terminable*, but borrowing, in *quasi perpetuity*, has hitherto been the mode adopted by most States in the creation of the bulk

of their debt (*Encyc. Brit.*, 9th ed., vol. xvii. tit. "National Debt"). A National Debt is either *external* or *internal*, according as loans are raised either within or without the country. In the opinion of one eminent authority, though the whole debt of a nation were owing to its own people, it would not, upon that account, be the less pernicious (Adam Smith's *Wealth of Nations*, M'Culloch's edition, p. 421). Certainly *external* loans, even when raised for worthy objects, do sometimes render weak States subservient to foreign bondholders (Devas's *Political Economy*, p. 536). For the reduction and ultimate redemption of National Debt, sinking funds are sometimes formed. Save when these consist of genuine surplus revenues, as distinguished from borrowed moneys, they often increase rather than diminish the National Debt. The alternative to gradual redemption, by means of a surplus revenue, is immediate redemption by a general contribution (Mill's *Political Economy*, vol. ii. p. 469).

I. ORIGIN AND GROWTH OF THE NATIONAL DEBT OF THE UNITED KINGDOM.

The various foreign wars that this country has taken part in since the Revolution of 1688, when new connections with Europe introduced a new system of foreign policy, are mainly accountable for our present National Debt. Amongst these wars may be mentioned that with France, from 1691 down to the Peace of Ryswick in 1697; the war of the Spanish Succession, from 1703 to the Peace of Utrecht in 1713; the War of the Austrian Succession; that with France, terminating with the Treaty of Aix-la-Chapelle in 1748; the Seven Years' War, from 1756 to 1763; the American War, from 1775 to 1783; and the first and second French Revolutionary Wars, which lasted, almost without intermission, from 1793 to 1815. It was in the reign of William III. that the need of a National Debt first made itself felt (Gneist's *History of the English Parliament*, 4th ed., p. 351). At his accession, in 1688, the indebtedness of the nation was only £664,263, which sum comprised part of the money of which Charles II. had robbed the public creditor by shutting up the exchequer (Hallam's *Constitutional History of England*, 11th ed., vol. iii. p. 134 n. (d)), and was principally in the form of terminable annuities specially charged upon certain branches of revenue (Fenn on *The Funds*, 15th ed., p. 3). Owing to the great difficulty experienced in providing a revenue commensurate with the annual expenditure, the debt of the nation steadily increased after 1688. A serious decline then, moreover, took place in the produce of the taxes by which that revenue was levied (Hallam's *Constitutional History of England*, 11th ed., vol. iii. pp. 134, 135). On the other hand, however, the riches of the nation had been rapidly increasing, and there was a very considerable hoarded capital awaiting safe and profitable employment (Macaulay's *History of England*, vol. vi. p. 329). Obviously, therefore, the moment was propitious for the State to borrow and for the public to lend, and of this opinion were these eminent financiers Godolphin and Montagué, who, in 1692, sat at the Board of Treasury. Accordingly, on the 15th December of that year, the House of Commons resolved itself into a Committee of Ways and Means, with Somers in the chair, when Montagué proposed to raise a million by way of loan (Macaulay's *History of England*, vol. vi. p. 336). This proposition having been carried, a bill, giving effect thereto, was passed on the 20th January 1693 (*ibid.*). New duties were imposed on beer and other liquors, and a fund was thus formed, on the credit of which the million borrowed was to be obtained by the issue of life annuities, which, on the tontine principle, were to be divided, as the annuities dropped off, among the survivors, till their number was reduced to seven (*ibid.*). The sum so raised did not long suffice for the exigencies of the State, and further borrowing was soon resorted to. At first it was customary always to borrow upon the security of some tax or portion of a tax set apart as a fund for discharging the principal and interest of the loan (Palgrave's *Dictionary of Political Economy*, vol. i. tit. "Debts, Public"). This discharge was however very rarely effected, and, the public wants still continuing, either old loans used to be extended beyond the prescribed period, or the taxes were again mortgaged for fresh ones, until at length the practice of borrowing for a fixed period, varying from five to ten years, or, as it was commonly styled, upon *terminable* annuities, was almost entirely abandoned, and most loans were made upon *interminable* annuities, or until such time as it might be convenient for Government to pay off the principal (M'Culloch's *Commercial Dictionary*, new ed., tit. "Funds"; Palgrave's *Dictionary of Political Economy*, tit. "Debts, Public"; Fenn on *The Funds*, 15th ed., p. 3). It is still the constant practice of Government to borrow in anticipation of revenue, it being practically impossible so to adjust the collection of taxes as to meet at the due dates throughout the year the payments requiring to be made from the public exchequer

(Palgrave's *Dictionary of Political Economy*, tit. "Debts, Public"). During the past and the early years of the present century, enormous sums were borrowed in this way at a price far below par (*Encyc. Brit.*, 9th ed., vol. xvii. tit. "National Debt"); and according to a calculation made some few years ago, the existing National Debt was thereby increased to nearly two-fifths more than the sum actually advanced by the lenders, while the country is actually paying six or seven millions a year more, on account of the public debt, than would have been required had the whole debt been borrowed and funded at par (McCulloch's *Commercial Dictionary*, new ed., tit. "Fund"; *Encyc. Brit.*, 9th ed., vol. xvii. tit. "National Debt"). At William III.'s death, the National Debt amounted to £16,392,702, of which, however, above three millions were to expire in 1710 (Hallam's *Constitutional History of England*, 11th ed., vol. iii. p. 134 n. (d); Sinclair's *History of the Revenue*, 3rd ed., vol. i. p. 425). It subsequently grew to fabulous proportions. Thus, through the Seven Years' War, it was increased to £139,000,000; by the American War, to £248,000,000; and through the two French Revolutionary Wars, to £840,000,000 (Gneist's *History of the English Parliament*, 4th ed., p. 352; Fenn on *The Funds*, 15th ed., p. 3). These two last-named wars alone contributed no less a sum than £622,163,027 to the national indebtedness, if the Irish quota be included (Part I. Sessional Paper, 366 of 1869, being return to an Order of the House of Commons, dated 24th July 1866). Since 1815 the most considerable debts incurred were £20,000,000, borrowed in 1835 and 1836 for the purpose of compensating the owners of slaves in the Colonies, and over £30,000,000, in 1855 and 1856, for the Crimean War (Fenn on *The Funds*, 15th ed., p. 16). According to a recent return presented to the House of Commons, and dated 24th June 1897, the aggregate gross liabilities of the State on the 31st March 1897, as represented by the Nominal Amount of Funded Debt, the estimated capital value of Terminable Annuities, the Unfunded Debt, and other liabilities in respect of debt, amounted to £644,909,847 (since reduced, according to Budget Speech of Chancellor of the Exchequer of 21st April 1898, to £638,305,000), entailing an annual liability, on account of interest and management alone, of no less a sum than £17,941,227, which, if the issues on account of capital (including new Sinking Fund from 1875) be added, must be increased to £25,383,210. As will presently be seen, these figures, though in themselves formidable enough, indicate that in recent years, by means of sinking funds and other methods, the National Debt is gradually being reduced.

II. WHAT STOCKS AND SECURITIES NOW REPRESENT THE NATIONAL DEBT.

The National Debt now comprises—(1) the Funded Debt; (2) Terminable Annuities; and (3) the Unfunded Debt, and other Capital Liabilities.

(1) The *Funded* Debt is that which is secured to the national creditor upon the public funds (Stephen's *Commentaries*, 11th ed., p. 584). As to what the expressions "The Funds," or "Government Funds," or "The Public Funds," are synonymous with, see per Lord Cranworth in *Slingsby v. Grainger*, 1859, 7 H. L. at p. 280; 28 L. J. Ch. 617; *Howard v. Kay*, 1858, 27 L. J. 448; *Johnson v. Digby*, 1829, 4 L. J. Ch. 38; *Burnie v. Getting*, 1845, 2 Colt. 324; *Brown v. Brown*, 1858, 4 Kay & J. 704; *Mangin v. Mangin*, 1852, 16 Beav. 300. Originally, the term "fund" signified the sources of revenue appropriated to the discharge of the principal and interest of loans, but it now means the principal of the loans themselves (Wharton's *Law Lexicon*, 9th ed., p. 323). The form of security held by the public creditors, in respect of the Funded Debt, is that of annuities granted by Parliament to those who originally advanced the money, and conferred, for the most part, in perpetuity, affording a certain rate of interest for ever upon the principal sum due (Stephen's *Commentaries*, 11th ed., vol. ii. p. 586). These annuities form the Funded Debt. The interest therein of the stockholder is, properly speaking, nothing but a right to receive a perpetual annuity, subject to redemption, having thus no resemblance to a chattel moveable or coined money, capable of possession and manual apprehension (per Sir W. Grant, M. R., in *Wildman v. Wildman*, 1803, 9 Ves. at p. 177; and see per Sir R. Arden, M. R., in *Kirby v. Potter*, 1799, 4 Ves. at p. 750; per Lord Thurlow, in *Dundas v. Dutens*, 1790, 1 Ves. at p. 197). Hence Government stock cannot be sued for as money (*Nightingall v. Devisme*, 1770, 2 Black. W. 684). The Funded Debt is

charged on and payable out of a fund denominated "The *Consolidated Fund*" (33 & 34 Vict. c. 71, s. 6), which was established in 1787 by statute (56 Geo. III. c. 98; 46 & 47 Vict. c. 1; 46 & 47 Vict. c. 5). This fund comprises the produce of all the taxes, and is pledged for the payment of the whole of the interest of the National Debt of the United Kingdom. The stock constituting the Funded Debt is not only transferable by the holder, but it passes by law to his representatives, and is subject in every material particular to all the incidents ordinarily attaching to personal property (33 & 34 Vict. c. 71, s. 9; Grant's *Law of Banking*, 5th ed., pp. 308, 309; Stephen's *Commentaries*, 11th ed., vol. ii. p. 586). The public faith is pledged to the payment thereof; but the stockholders have no right to call for such payment, while, on the other hand, the State retains the right of redemption, and this right, as will presently be seen, has in recent years been exercised to a very considerable extent. The National Debt Act, 1870 (33 & 34 Vict. c. 71), provides for the continuance of the actual permanent Funded Debt on existing terms (s. 5), and renders the interest of the stockholders indefeasible (s. 8). The first schedule thereto gives the denominations of the several stocks of the Perpetual Annuities. Of the stocks there mentioned, however, "3 per cent. Consols," "3 per cent. Reduced," and "New 3 per cents.," were, as will presently appear, paid off and converted into $2\frac{3}{4}$ per cent. stocks by The National Debt (Conversion) Act, 1888 (51 & 52 Vict. c. 2), which by sec. 2 prescribes the denomination and incidents of the new stock. From a return made to the House of Commons on 24th June 1897, it appears that on 31st March 1897 the Funded Debt comprised the following stocks:—

FUNDED DEBT.

	£	s.	d.
(1) $2\frac{3}{4}$ per cent. Consols	524,101,051	13	9
(2) $2\frac{3}{4}$ per cents. (1905)	4,647,222	18	5
(3) $2\frac{3}{4}$ per cents.	31,887,228	6	9
(4) Exchequer Bonds, 1853, per 16 Vict. c. 23 ($2\frac{3}{4}$ per cent.)	417,300	0	0
(5) Debts to the Banks of England and Ireland ($2\frac{3}{4}$ per cent.)	13,645,869	4	8
(6) Book debt, 1892 ($2\frac{3}{4}$ per cent.)	13,000,000	0	0
Total Funded Debt	£587,698,732	3	7

(2) As regards *Terminable Annuities*—they have long formed a means for reducing the Funded Debt (see *Encyc. Brit.*, 9th ed., vol. xvii. tit. "National Debt") by a system of life annuities granted in exchange for stock, and charged on and payable out of a sinking fund. Every person who transferred his stock to the Commissioners for the Reduction of the National Debt (as to whom see *post*), was, by the system inaugurated in 1808, entitled to such an annuity as was equivalent to the value of the stock and of his life; the calculation proceeding on the principle that the sum he would have received as interest, the additional sum granted as an annuity, and the compound interest on the whole, would redeem the amount transferred within the period to which the individual's life was calculated as likely to extend (Report presented to Parliament of the Proceedings of Commissioners for Reduction of National Debt, from 1786 to 1890, C. 6539, p. 11). Terminable Annuities have been created by various statutes. See The Life Annuities Act, 1808 (48 Geo. III. c. 142); The Government Annuities Act, 1829 (10 Geo. IV. c. 24); The Government Annuities Act, 1833 (3 & 4 Will. IV. c. 24); The Government Annuities Act, 1873 (36 & 37 Vict. c. 44); The Revenue Friendly Societies and National Debt Act, 1882 (45 & 46 Vict. c. 72); The National Debt Act,

1883 (46 & 47 Vict. c. 54); and The National Debt (Supplemental) Act, 1888 (51 & 52 Vict. c. 15). The Commissioners for the Reduction of the National Debt are empowered by The Government Annuities Act, 1829 (10 Geo. IV. c. 24), which mainly regulates the mode of granting these annuities, to accept transfer of stock or receive money for the purchase of annuities for life, immediate or deferred, or for terms of years (s. 1). No transfer for less than £100 is permitted (s. 3), nor payment of less than £5 a year in respect of deferred annuities (*ibid.*); and no annuities on the life of a nominee under fifteen will be granted, nor in any other case where the said Commissioners think proper to decline (s. 2). All these annuities are now paid quarterly (51 & 52 Vict. c. 15, s. 2). A life annuity granted under The Government Annuities Act, 1829 (10 Geo. IV. c. 24), but *after* the 28th June 1888, cannot be added to or consolidated with a life annuity granted *before* that date (51 & 52 Vict. c. 15, s. 2 (5)). The formalities to be observed in order to purchase Government Annuities, to obtain periodical payment thereof, and with regard to their transfer, are for the most part prescribed by The Government Annuities Act, 1829 (10 Geo. IV. c. 24; and see *A.-G. v. Ray*, 1874, L. R. 9 Ch. 397), which, moreover, it may be as well to mention, provides that annuities shall be personal property, and where the same do not depend upon the life of the person entitled thereto, shall go to his personal representatives, and not to his heirs (s. 35).

Besides the annuities just referred to, the Commissioners for the Reduction of the National Debt are empowered by statute to grant immediate or deferred annuities (not exceeding £100 a year) to depositors in Government Savings Banks, or other persons of small means, which annuities are termed "Savings Bank Annuities" (The Savings Bank Act, 1833, 3 & 4 Will. IV. c. 14; The Government Annuities Act, 1853, 16 & 17 Vict. c. 45; The Government Annuities Act, 1864, 27 & 28 Vict. c. 43; The Government Annuities Act, 1882, 45 & 46 Vict. c. 51). As to certifying to the Treasury the amount of Terminable Annuities from time to time payable, see 10 Geo. IV. c. 24, s. 10; 35 & 36 Vict. c. 68, s. 8.

From a return to the House of Commons relating to the National Debt, and dated 24th June 1897, it appears that on 31st March 1897 the Terminable Annuities outstanding were as follows:—

TERMINABLE ANNUITIES.

(1) Annuities for life and terms of years	£11,826,894
(2) Red Sea and India Telegraph Co.'s Annuity, expiring 1908, per 25 & 26 Vict. c. 39	334,894
(3) Annuities created by the National Debt Act, 1883 (46 & 47 Vict. c. 54); National Debt and Local Loans Act, 1887 (50 & 51 Vict. c. 16); and National Debt (Supplemental) Act, 1888 (51 & 52 Vict. c. 15)—	
(a) Converted Annuities, expiring 1904	4,024,282
(b) Chancery Funds Annuity, expiring 1904	18,282,752
(c) Savings Banks Annuities, expiring 1901–1902	9,481,843
(4) Minor Annuities	991,192
Total estimated capital value of Terminable Annuities	<u>£44,941,947</u>

(3) Next, as regards the *Unfunded* Debt and other Capital Liabilities—the Unfunded Debt is ordinarily of but small amount, and is generally secured by Exchequer bills and bonds, which are instruments issued under the authority of Parliament, and containing an engagement by the State for the repayment of the principal sums advanced, with interest meanwhile

(Stephen's *Commentaries*, 11th ed., p. 584). Exchequer bills authorised by Parliament are paid out of the Consolidated Fund (29 & 30 Vict. c. 25), and, together with Exchequer bonds and Treasury bills, must have the name of one of the Secretaries to the Treasury impressed thereon (52 Vict. c. 6, s. 5).

From a return to the House of Commons relating to the National Debt, and dated 24th June 1897, it appears that on the 31st March 1897 the *Unfunded Debt* and other Capital Liabilities were as follows:—

UNFUNDED DEBT AND OTHER CAPITAL LIABILITIES.

(a) Unfunded Debt—

Treasury bills for Supply held by the National Debt Commissioners	£1,588,300
Held by the Public	6,544,700
(b) Other Capital Liabilities	4,136,168

Total Unfunded Debt and other Capital Liabilities	<u>£12,269,168</u>
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III. THE MANAGEMENT OF THE NATIONAL DEBT.

The following statutes directly or indirectly concern this subject, namely:—The Consolidated Fund Act, 1816 (56 Geo. III. c. 98); The Government Annuities Act, 1832 (2 & 3 Will. IV. c. 59); The Public Revenue and Consolidated Fund Charges Act, 1854 (17 & 18 Vict. c. 94); The Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39); The Crown Lands Act, 1866 (29 & 30 Vict. c. 62); The Telegraph Act, 1869 (32 & 33 Vict. c. 73); The National Debt Act, 1870 (33 & 34 Vict. c. 71); The Telegraph (Money) Act, 1871 (34 & 35 Vict. c. 75); The Military Forces Localisation Act, 1872 (35 & 36 Vict. c. 68); The Telegraph Act, 1873 (36 & 37 Vict. c. 83); The Sinking Fund Act, 1875 (38 & 39 Vict. c. 45); The Telegraph (Money) Act, 1876 (39 & 40 Vict. c. 5); The Treasury Bills Act, 1877 (40 & 41 Vict. c. 2); The Savings Bank Act, 1880 (43 & 44 Vict. c. 36); The National Debt Act, 1881 (44 & 45 Vict. c. 55); The Revenue, Friendly Societies, and National Debt Act, 1882 (45 & 46 Vict. c. 72); The National Debt (Conversion of Stock) Act, 1884 (47 & 48 Vict. c. 23); The National Debt and Local Loans Act, 1887 (50 & 51 Vict. c. 16); The National Debt (Conversion) Act, 1888 (51 & 52 Vict. c. 2); The National Debt (Supplemental) Act, 1888 (51 & 52 Vict. c. 15); The National Debt Redemption Act, 1889 (52 & 53 Vict. c. 4); The National Debt Act, 1889 (52 & 53 Vict. c. 6); The Barracks Act, 1890 (53 & 54 Vict. c. 25); The National Debt (Conversion of Exchequer Bonds) Act, 1892 (55 & 56 Vict. c. 26); The National Debt (Stockholder's Relief) Act, 1892 (55 & 56 Vict. c. 39); and The British Museum Purchase of Land Act, 1894 (57 & 58 Vict. c. 34).

The management of the National Debt is in the hands of—(1) The Banks of England and Ireland; (2) The Treasury; and (3) The Commissioners for the Reduction of the National Debt.

(1) As regards the constitution of the Bank of England, see tit. BANK OF ENGLAND, *ante*, vol. i. pp. 477 *et seq.* The Bank of Ireland was established by a Royal Charter in pursuance of an Act of the Irish Parliament (21 & 22 Geo. III. c. 16), and possesses similar privileges to the Bank of England, and is governed by similar principles (Grant's *Law of Banking*, 5th ed., p. 330). The Bank of England is the banker or agent of the Government for the management of the National Debt, and the Bank of Ireland acts in a similar capacity in regard to the public debt of Ireland (*ibid.*, p. 308). The unredeemed National Funded Debt is, as has already been stated, repre-

sented by stock and terminable annuities, transferable at the Bank of England and at the Bank of Ireland respectively. The duties of these banks with regard to the National Debt are mainly prescribed by The National Debt Act, 1870 (33 & 34 Vict. c. 71), and amending statutes, which, as provided by the The Short Titles Act, 1896 (59 & 60 Vict. c. 14), may be cited as The National Debt Acts, 1870 to 1893. The principal Act consolidates the law as to the denomination of stock, payment of dividends, and transfer, and also fixes terms and dates of redemption. It provides that the stocks of perpetual annuities, described in the First Schedule to the Act, and which form the Funded Debt already mentioned, shall continue to be transferable in the books of the Bank of England or of Ireland, by the several stockholders for the time being, and their representatives (s. 5). In this connection it should be stated that, when by virtue of any statute the right to stock is vested in any person, he shall be deemed to be entitled to make a valid transfer of the stock, and to receive and give a valid receipt for any accrued or accruing dividends thereon (55 & 56 Vict. c. 39, s. 4). Until all stocks are redeemed, the Banks of England and Ireland are each respectively required, by the principal Act, to continue to employ, within their office, a fit person as their chief cashier, and another fit person as their accountant-general (s. 13). In the offices of the respective accountants-general of the Banks of England and Ireland, books are required to be kept wherein all transfers of stock shall be entered (s. 22). Every such entry must be properly worded for the purpose of the transfer, and signed by the party making the transfer or by his attorney, lawfully authorised in writing (s. 22). The person to whom the transfer is made is at liberty to underwrite his acceptance thereof (*ibid.*), though the stock vests by transfer, without any such formality (*R. v. Gade*, 1796, 2 Leach, 732; and see *Foster v. Bank of England*, 1846, 8 Q. B. 689). No other mode of transferring stock than that just described is good in law (s. 22). A stockholder whose stock has been transferred by forgery, may call upon the bank to replace it and to pay him the dividends thereon (*Davis v. Bank of England*, 1824, 2 Bing. 393; and see *Sloman v. Bank of England*, 1845, 14 Sim. 475). Making false entries in the books of the public funds kept by the Bank of England or Ireland is a felony (24 & 25 Vict. c. 98, s. 5). Likewise to forge a transfer (s. 2) or personate a stockholder (s. 3). Before allowing any transfer of stock, the Banks of England and Ireland may require evidence of the title of any person claiming a right to make the transfer (33 & 34 Vict. c. 71, s. 24), and either bank may prescribe what evidence it pleases, and will not be compelled by the Court to depart from its own settled practice in this respect (*Prosser v. Bank of England*, 1872, L. R. 13 Eq. 611; 41 L. J. Ch. 327). Generally speaking, however, a declaration of competent persons, made under the Statutory Declarations Act, 1835 (5 & 6 Will. iv. c. 62), will be accepted as sufficient. For unreasonable delay in passing a power of attorney for the transfer of stock, the Bank of England is liable in damages if loss is sustained (*Sutton v. Bank of England*, 1824, 1 Car. & P. 193; and see *Prosser v. Bank of England*, *ubi supra*; and *Humburston v. Chase*, 1836, 3 Y. & C. Ex. 209); but, on the other hand, reasonable time must be given to the bank in which to authenticate the power (*ibid.*), and no *mandamus* to the bank to transfer stock will ever be granted where a remedy by action is available (*R. v. The Bank of England*, 1780, 2 Doug. 524). In this connection it may be mentioned that where the district of a local board is incorporated as a borough, the Bank of England is bound, on the request of the corporation, to register, in their corporate name, Government stock which previously stood in the books of the bank in the

name of the local board, without requiring any transfer to be executed (*Corporation of Hyde v. Bank of England*, 1882, 21 Ch. D. 176). With regard to the holding of stock by bodies corporate, see The National Debt (Stockholders' Relief) Act, 1892 (55 & 56 Vict. c. 39), s. 6. Prior to this enactment, the Court refused a *mandamus* to the Bank of England to register a transfer of consols in the joint names of a corporation and an individual (*Law Guarantee and Trust Society v. Bank of England*, 1890, 24 Q. B. D. 406). Generally speaking, where an order of Court is required to give a right to call for a transfer of stock, the Bank of England is entitled to demand "a *clean order*," *i.e.* one obtained exclusively for the purpose. This rule is, however, not invariable, and there is jurisdiction in the High Court to depart from it, in which case the Bank must obey whatever order is made (*In re Shortridge*, [1895] 1 Ch. 278 (C. A.)). When, however, an order is irregular in form, the bank is justified in refusing to act upon it (*In re Tweedy*, 1885, 28 Ch. D. 530 (C. A.)). As regards transfer of stock by or to a married woman, see Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 6, 7. Formerly a married woman could not, without her husband's concurrence, transfer stock to which she was entitled for her separate use (*Howard v. Bank of England*, 1875, L. R. 19 Eq. 295; 44 L. J. Ch. 329; 23 W. R. 303). As to transfer of stock by executors, see National Debt Act, 1870 (33 & 34 Vict. c. 71), s. 23, and *Franklin v. Bank of England*, 1829, 9 Barn. & Cress. 156; 32 R. R. 611. The Bank of England ignores *trusts* altogether, and does not look beyond the legal title, and therefore cannot prevent an executor from selling out or transferring stock into his own name (*Bank of England v. Parsons*, 1800, 5 Ves. 664; 33 & 34 Vict. c. 71, s. 30; *Hartga v. Bank of England*, 1796, 3 Ves. 55; Grant's *Law of Banking*, 5th ed., pp. 318-320). As to obtaining a *distringas* on stock or a stop or charging order, see R. S. C. 1883, Order 46, by which the subject is now regulated. As to transfer of stock from Bank of England to Bank of Ireland, and *vice versa*, see National Debt Act, 1870 (33 & 34 Vict. c. 71, ss. 43-50, forming Part VI. of the Act). Where stock in the funds is purchased in the *joint* names of two persons, the survivor takes it (*Crossfield v. Such*, 1853, 8 Ex. Rep. 825; and see *Batstone v. Salter*, 1875, L. R. 10 Ch. 431; *Tunbridge v. Care*, 1871, 25 L. T. 150). On the other hand, where stock has been purchased in the joint names of two, out of money standing to their joint-account in the bank, it is not necessarily to be considered as held in joint-tenancy; but the origin of the money and the acts and intentions of the parties may be regarded, and a tenancy in common inferred from all the circumstances (*Robinson v. Preston*, 1858, 27 L. J. Ch. 395; and see *Bone v. Pollard*, 1857, 24 Beav. 283). In general, it is a rule with the Bank of England not to allow a fund to be transferred into the names of more than *four* joint-owners (Grant's *Law of Banking*, 5th ed., pp. 319, 320). They may, however, allow any holder or joint-holders of stock to hold on different accounts (55 & 56 Vict. c. 39, s. 5; and see 51 & 52 Vict. c. 2, s. 18). The Banks of England and Ireland may close their transfer-books for dividend for not more than fifteen days (33 & 34 Vict. c. 71, s. 15), and may strike the balance for a dividend on any day not more than thirty-seven days before the day on which the dividend is payable (55 & 56 Vict. c. 39, s. 2). Every stockholder is entitled to inspect that particular entry in the bank transfer-books which relates to the transfer of his stock, but not any other part of the bank-books (*Foster v. Bank of England*, 1846, 8 Q. B. 689; and see *Heslop v. Bank of England*, 1833, 6 Sim. 192). As to application to inspect by a person not having a *bonâ fide* interest, see *R. v. Governor, etc., of the Bank of*

England, [1891] 1 Q. B. 785. As to proof of bank-books by examined copies, see Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), and *Howard v. Beall*, 1889, 23 Q. B. D. 1; *Harding v. Williams*, 1880, 14 Ch. D. 197. With regard to the payment of dividends on stock entered in the books of the Banks of England or Ireland, the subject is governed by the following sections of The National Debt Act, 1870 (33 & 34 Vict. c. 71), to which reference must be made:—Sec. 14 (money required for payment of dividends to be issued by Treasury to the banks); sec. 15 (money so received to be applied forthwith in payment of dividends); sec. 16 (banks to account to Treasury for money received); sec. 17 (receipt of dividends by executors, etc.); sec. 18 (evidence of title to dividends); sec. 19 (dividends in case of infancy, etc., of a joint-stockholder, and see also 55 & 56 Vict. c. 39, s. 3); sec. 19, and see also 55 & 56 Vict. c. 39, s. 2 (right to dividends as between transferor and transferee). As to unclaimed dividends, see secs. 51–68; and see also National Debt Act, 1889 (52 Vict. c. 6), s. 4, and following cases, namely:—*In re Ashmead's Trusts*, 1872, L. R. 8 Ch. 113; *Ex parte Mary Jameson*, 1875, L. R. 19 Eq. 430; *R. v. Governor, etc., of the Bank of England*, [1891] 1 Q. B. 785; *In re Bishton*, 1858, 27 L. J. Ch. 168; *Ex parte Ram*, 1837, 3 Myl. & Cr. 25; *Hunt v. Peacock*, 1847, 6 Hare, 361; *In re Acland's Trusts*, 1872, 26 L. T. 418. As to transmission of dividend warrants by post, see The National Debt Act, 1889 (52 Vict. c. 6), s. 4 (2), (3). The National Debt Act, 1870 (33 & 34 Vict. c. 71), enables the holders of public stocks in England and Ireland to convert their stock into certificates to bearer, having coupons attached for the payment of the dividends (s. 26); and so long as a certificate is outstanding, the stock represented thereby ceases to be transferable (s. 31). These certificates are either *to bearer* or *nominal*. As regards distinction between these two kinds of certificates, see secs. 32, 33. For further information as to stock certificates, see secs. 26–42, forming Part V. of The National Debt Act, 1870 (33 & 34 Vict. c. 71); the Third Schedule of the Act; and the National Debt (Stockholders' Relief) Act, 1892 (55 & 56 Vict. c. 39), s. 7. The remuneration of the Banks of England and Ireland for their trouble, etc., in regard to the management of the National Debt, is mainly regulated by the Bank Act, 1892 (55 & 56 Vict. c. 48); see also The National Debt Act, 1870 (33 & 34 Vict. c. 71), ss. 40, 63, and 64. It is expressly provided by sec. 74 of last-named Act, that the Bank of England or of Ireland, or any member of the corporation thereof respectively, shall not incur any disability for or by reason of those banks respectively doing anything in pursuance of the National Debt Act, 1870 (33 & 34 Vict. c. 71).

(2) Next as regards *the Treasury*.—A general financial supervision over all public departments is exercised by the Treasury. As to its origin and constitution, see tit. TREASURY. Its duties with regard to the National Debt are mainly regulated by the National Debt Act, 1870 (33 & 34 Vict. c. 71), which provides that, in that Act, the term "*Treasury*" shall signify the Commissioners of Her Majesty's Treasury, or two of them (s. 3). It is the Treasury which issues to the Banks of England and Ireland money out of the Consolidated Fund for the payment of dividends on stock (s. 14); which provides for the audit of the accounts of the respective chief cashiers of those banks (s. 16); which empowers, from time to time, the Banks of England and Ireland to investigate the circumstances of any stock or dividends remaining unclaimed, with a view to ascertain the owners thereof (s. 63); which allows compensation to the said banks for their trouble and expense in carrying out the provisions of Part VII. of the National Debt

Act, 1870 (33 & 34 Vict. c. 71), with regard to unclaimed dividends (ss. 63, 64); and which is required to concur in the general regulations made by the said banks with respect to stock certificates and coupons (s. 39); and with respect to the mode of transmitting dividends on stock (52 Vict. c. 6, s. 4). Under The Consolidated Fund Act, 1816 (56 Geo. III. c. 98); The Government Annuities Act, 1853 (16 & 17 Vict. c. 45); The Public Revenue and Consolidated Fund Charges Act, 1854 (17 & 18 Vict. c. 94); The Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39), and various other statutes, the Treasury has duties in connection with the administration of the National Debt devolving upon it.

(3) As regards *the Commissioners for the Reduction of the National Debt*.—The appointment of these officials dates from 1786, when 26 Geo. III. c. 31, was passed, being an Act for vesting certain sums in Commissioners at the end of every quarter of a year, to be by them applied to the reduction of the National Debt. In the National Debt Act, 1870 (33 & 34 Vict. c. 71), they are termed the National Debt Commissioners (s. 3), and in referring to them it is convenient to adopt that designation. The original Commissioners were the Speaker, the Chancellor of the Exchequer, the Master of the Rolls, the Accountant-General of the Court of Chancery, the Governor and Deputy-Governor of the Bank of England, all for the time being (26 Geo. III. c. 31, s. 14). Modifications in their original constitution have been effected by statute. Thus the Chief Baron of the Exchequer was added as a Commissioner (48 Geo. III. c. 142, s. 32), and, on that office being abolished, by Order in Council of 16th December 1880, the Lord Chief Justice succeeded to the duties thereof (44 & 45 Vict. c. 68, s. 25), while the Paymaster-General now replaces the Accountant-General of the Court of Chancery, whose office was abolished by 35 & 36 Vict. c. 44. With the above exceptions, the Commissioners remain as originally constituted; but the duties which devolve upon them have been varied from time to time, and largely extended by subsequent legislation. In this place it is sufficient to state that, with regard to the transfer of stock by a holder thereof from the Bank of England to the Bank of Ireland, or *vice versa*, the duties of these Commissioners are prescribed by secs. 43, 45, 46, and 47 of the National Debt Act, 1870 (33 & 34 Vict. c. 71); that, by virtue of the same statute, unclaimed stock is transferred to them (s. 51); and see *In re National Debt Act, Ex parte Byrne*, 1897, 1 Ir. R. Ch. 61; *Ex parte House*, *In re May*, 1885, 28 Ch. D. 516; *In re Ashmead's Trusts*, 1872, L. R. 8 Ch. 113; and unclaimed dividends paid to them (s. 61), the subject being regulated by various sections contained in Part VI. of the Act (see ss. 52, 54, 60, 65, 67, and 69), and also by the National Debt (Conversion) Act, 1888 (51 & 52 Vict. c. 2), which provides that, six months before any transfer of stock to the said Commissioners, the Bank of England or Ireland shall give notice in writing to the stockholder at his registered residence of the impending transfer (s. 1). Where there was a bequest of stock to the Government, "in execution of the National Debt," it was directed to be transferred to such persons as the Crown under its sign manual should appoint (*Newland v. A.-G.*, 1809, 3 Mer. 684).

IV. THE CONVERSION OF THE NATIONAL DEBT.

The following statutes mainly govern this subject, namely:—The Sinking Fund Act, 1875 (38 & 39 Vict. c. 45); The Treasury Bills Act, 1877 (40 & 41 Vict. c. 2, s. 7); The National Debt Conversion of Stock Act, 1884 (47 & 48 Vict. c. 23); The National Debt Conversion Act, 1888 (51 & 52 Vict. c. 2); The National Debt (Conversion of Exchequer Bonds)

Act, 1892 (55 & 56 Vict. c. 26); and The Finance Act, 1894 (57 & 58 Vict. c. 30, s. 41). By conversion of the National Debt is meant the reduction effected in the annual interest charge thereon, by conversion of stock from a higher to a lower denomination. The principal conversions of the National Debt that have taken place are as follows:—In 1716 Walpole converted 5 into 4 per cents., with an annual saving to the country of £325,000; in 1749, when the first really important conversion was effected, Pelham converted 4 into 3 per cents., with an annual saving of £565,000; in 1822 Vansittart converted 5 into 4 per cents., thereby annually saving £1,500,000; in 1824 Robinson converted 4 into $3\frac{1}{2}$ per cents., with an annual saving of £380,000; in 1830 Goulburn converted 4 into New $3\frac{1}{2}$ per cents., with option of conversion into a 5 per cent. stock of smaller nominal capital amount, thus saving £753,952 a year; and, in 1844, he likewise converted $3\frac{1}{2}$ into $3\frac{1}{4}$ per cents., with an annual saving of £621,893 (Mulhall's *Dictionary of Statistics*, tit. "Finance," p. 262; Sessional Paper C. 6539 of 1890 *passim*). In 1853 Mr. Gladstone effected a conversion by offering certain alternatives to the holders of several 3 per cent. stocks, chiefly South Sea Annuities, which amounted to about £9,500,000. The second portion of his scheme related to the issue of Exchequer bonds, and the third, to a voluntary conversion by the holders of Consols and Reduced $3\frac{1}{2}$ per cents., his object throughout being to lay the foundation of a $2\frac{1}{2}$ per cent. stock, redeemable at the option of the holders. The Act (16 Vict. c. 23) was passed to carry out this scheme. In 1884, at the instance of Mr. Childers, a Conversion Act (47 & 48 Vict. c. 23) was passed, which gave power to the Treasury, during two years from the 3rd July 1884, to create $2\frac{3}{4}$ and $2\frac{1}{2}$ per cent. stocks, to be exchanged for 3 per cents. at rates to be fixed by the Treasury, but not exceeding 102 of the first or 108 of the second, for each 100 3 per cent. stock. Both the $2\frac{3}{4}$ and $2\frac{1}{2}$ per cent. Stocks were not to be redeemable until the 5th January 1905, on and after which they could be paid off at par, after not less than one month's notice, provided the portion redeemed at one time were not less than £5,000,000 in the case of $2\frac{3}{4}$ per cent., and £14,000,000 in the case of $2\frac{1}{2}$ per cent. Stock. Of the £22,362,595 converted by this scheme, £11,950,123 was held by Government departments, leaving £10,412,472 converted by the general public. The immediate decrease in the annual charge was, however, not more than £46,756, 2s. 8d.

In 1888 Mr. Goschen undertook by far the most important conversion of the National Debt that had ever been achieved in this country. Not only was the amount of stock to be converted considerably in excess of that previously dealt with, but the difficulty of its conversion was enhanced by the fact that a large proportion of it was protected against redemption by the provision that a year's notice must first be given to its holders. The conversion was, however, successfully accomplished, by means of the National Debt (Conversion) Act, 1888 (51 Vict. c. 2), followed by The National Debt (Supplemental) Act, 1888 (51 & 52 Vict. c. 15), and by the National Debt (Redemption) Act, 1889 (52 Vict. c. 4). The effect of the scheme embodied in this legislation is to reduce 3 per cents. into New Stock, bearing $2\frac{3}{4}$ per cent. for a certain period, and, afterwards, only $2\frac{1}{2}$ per cent. By reason of this conversion, an annuity under a will having become insufficient, it was held that, having regard to the words of the will, the annuity was chargeable on the capital of the fund (*Pack v. Darby*, 1895, W. N. 123 (6)). Again, for the purpose of redeeming a rent-charge, the creators thereof have a right, since the above conversion, to substitute $2\frac{3}{4}$ per cent. for 3 per cent. Annuities (*Duke of Northumberland*

v. *Percy*, [1893] 1 Ch. 298; and see *In re Borough's Estate*, 1893, 31 L. R. Ir. 244). As regards the effect of the conversion on a bequest of 3 per cent. Annuities, see *In re Howell, Shepherd, Churchill v. St. George's Hospital*, [1894] 3 Ch. 649). The total amount of 3 per cents. converted under Mr. Goschen's scheme was £565,684,164, 14s. 9d., and the amount of New Stock created in lieu thereof, £565,766,932, 10s. 4d., the small increase of £82,467, 15s. 7d. in the nominal capital being caused by the exchange made with the National Debt Commissioners on the 5th July 1889 of stock previously purchased by them for New Consols. The saving to the country, during the first year after Mr. Goschen's scheme became law, exceeded £1,000,000, while the savings during each of the subsequent thirteen years has been estimated at about £1,450,000, and after 1903–1904 that saving will be doubled (Conversion and Redemption under National Debt Conversion Act, 1888, and National Debt Redemption Act, 1889, by Sir E. W. Hamilton, K.C.B., Assistant-Secretary to the Treasury, p. 62). By means of Mr. Goschen's scheme the credit of the country has been raised, its burdens have been lightened, its resources increased, and the nation may well congratulate itself on having carried through, under the direction of Mr. Goschen, a financial operation compared with which all other like operations hitherto carried through in this or any other country sink into insignificance (*ibid.*, p. 63). (For a full account of the various conversions that have taken place, see Sessional Paper C. 6539, being a Report by the Secretary and Comptroller-General of the Proceedings of the National Debt Commissioners, from 1786 to 31st March 1890.)

V. THE REDEMPTION OF THE NATIONAL DEBT.

The following statutes relate to this subject:—The Crown Lands Act, 1860 (29 & 30 Vict. c. 62, s. 13); The National Debt Redemption Act, 1889 (52 & 53 Vict. c. 4); and The National Debt Redemption Act, 1893 (56 & 57 Vict. c. 64).

The reduction of the National Debt by means of sinking funds commenced in 1716, when one was introduced by Sir Robert Walpole. The Act establishing this Sinking Fund was 3 Geo. I. c. 7. Instead of keeping the fund inviolate, it was ultimately wholly diverted from its original purpose. This led to the establishment of another and different sinking fund, by Pitt, in 1786. The essential feature of Pitt's plan was the appropriation, out of the surplus revenues, of £1,000,000 a year, by quarterly instalments of £250,000 to form a sinking fund, and the appointment of Commissioners for the Reduction of the National Debt, in whom the money so issued should be vested, and whose duty should be to apply the same in the purchase of stock. To give effect to this plan, 26 Geo. III. c. 31, was passed. The plan was subsequently modified, and notably, in 1813, by 53 Geo. III. c. 35, and in 1823, by 4 Geo. IV. c. 19. In 1829 the Act 10 Geo. IV. c. 7, inaugurated a new departure in matters relating to the sinking fund, which was for the first time made applicable to the redemption of the *Unfunded Debt*. The last-named statute was, however, itself repealed in 1866 by The Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39). The Sinking Fund of 1829, called "The Old Sinking Fund," continued in force until 1875, when all previous legislation relating thereto was repealed (38 & 39 Vict. c. 45). The annual charge for the National Debt was then made a fixed sum, which was to be raised in three years to £28,000,000 (since reduced, in 1890, to £25,000,000), and the excess amount not required for the actual service of the debt was to be applied to the redemption of debt as the *New Sinking Fund*. In 1881–82

a sinking fund was formed to pay off certain stock then created, it being, however, provided that it was not to be included in the permanent annual charge (44 & 45 Vict. c. 55). This last-named sinking fund ceased under the National Debt and Local Loans Act, 1887 (50 & 51 Vict. c. 16). In 1886 and 1887, owing to heavy war expenses, sinking fund operations were suspended for twelve months, but were subsequently resumed. During the present reign the National Debt has decreased by £116,512,723. In 1896–1897 alone, the reduction of gross liabilities was £7,630,258, according to a Return to the House of Commons relating to the National Debt, dated 24th June 1897; while, in 1897–1898, a further reduction of £1,911,000 was effected, of which £267,000 was due to the redemption of land tax under the Act of 1896 (see Budget Speech of Chancellor of Exchequer, 21st April 1898).

[*Authorities.*—For detailed information as to the Redemption of the National Debt, see Sessional Papers, 366 of 1869, parts 1 and 2; C. 6359 of 1891; and C. 8520 of 1897.]

Nationality is the condition of belonging to a Nation (*q.v.*) or State (*q.v.*), either by birth or naturalisation (see ALIEN; ALIENAGE; BRITISH SUBJECT). The nationality of persons has played an important part in the development of private international law in several continental countries, where it has superseded domicile in fixing the law of status and capacity. Art. 3 of the French Civil Code, which says the laws concerning the status and capacity of persons govern Frenchmen, even though residing in foreign countries, is construed, *a contrario*, to involve the same principle as regards foreigners residing in France. The Italian Code (1865) has adopted this construction in the following article: “The status and capacity of persons, and their family relations, are governed by the law of the nation to which they belong” (Art. 3).

Nationaux—A word met with in French treaties and law books to describe the persons in whose name and on whose behalf a State acts.

Nations, Law of.—See INTERNATIONAL LAW; JUS GENTIUM.

Native-Born.—See NATURAL-BORN, NATIVE-BORN, SUBJECT.

Native Oysters.—See OYSTERS.

Natural Affection.—See CONTRACT, *Considerations insufficient in Law*, vol. iii., at p. 341; SEISIN, COVENANT FOR.

Natural Allegiance.—See ALLEGIANCE.

Natural-Born, Native-Born, Subject.—At common law everybody whose birth happened within the legiance of the Crown was

a natural-born subject; all else, unless they were children of the king, were aliens (see *sub voc.* ALIEN). "The character of a natural-born subject, anterior to any of the statutes, was incidental to birth only; whatever were the situations of his parents, the being born within the allegiance of the king constituted a natural-born subject" (Kenyon, C.J., in *Doe d. Duroure v. Jones*, 1791, 4 T. R. p. 308; 2 R. R. 390). And this rule is still the foundation of our law. Children born in an English ship are born within the allegiance, and an ambassador's house is also reputed to be part of his sovereign's realm, so as to confer upon the children of the ambassador born therein the character of natural-born subjects. The *status* of the parents is of no account, provided only the offspring be born within the realm. "A child born of foreign parents even during an accidental stay of a few days is fully, and until the age of twenty-one years irretrievably, a British subject" (Hall, p. 20). The character of natural-born subject is not given to persons born in a place which, though rightfully part of the dominions of the British Crown, happens to be at the time of the birth in the military possession of an enemy (see *Calvin's case*). The learning, old and new, of the subject will be found very fully in these cases: *Calvin's case* (1608, 6 Jac. 1; 7 Co. Rep. 1, 18 a; 2 St. Tri. 559); *Collingwood v. Pace* (1656, Sid. 193 and 1 Vent. 413); *De Geer v. Stone* (1882, 22 Ch. D. 243); *In re Stepney Election Petition, Isaacson v. Durant* (1886, 17 Q. B. D. 54).

The exception in favour of the king's children was recognised by the common law; all other exceptions to the broad rule have been made by statute. In Edward III.'s reign, the question of the capacity of children born beyond the seas to inherit the estates of their ancestors was raised at large (Parliament Roll, 17 Edw. III. 1343, p. 139), because of "doubt and difficulty"; in the particular instance of the king's children, there was declared to be no doubt; but as to the general rule, a decision was postponed until seven years later, when the matter was dealt with by the Act, *de Nativis ultra mare*, 25 Edw. III. stat. 1, 1350, which was declaratory as to the king's children; next, it enacted that certain persons named who were born out of the legiance of England should from henceforth have the same rights of inheritance as those born within the same; and finally provided that "all children inheritors which from henceforth shall be born without the legiance of the king, whose fathers and mothers at the time of their birth be and shall be at the faith and legiance of the king of *England*, shall have and enjoy the same benefits and advantages, to have and bear the inheritance within the same legiance, as the other inheritors aforesaid in time to come; so always, that the mother of such children do pass the sea by the license and wills of their husbands." This statute has been followed by others either dealing with the circumstances which make a person "natural-born," or enacting that certain classes of persons shall have the right to be deemed natural-born subjects of the Crown; 29 Car. II. c. 6 (1676) naturalised the children of English subjects born out of the kingdom "during the late troubles" (*State Trials*, vol. viii. 534); 11 & 12 Will. III. c. 6 (1700) enabled natural-born subjects to inherit their ancestors' estates, notwithstanding their fathers or mothers were aliens; by 7 Anne, c. 5 (1708), the children of all natural-born subjects born out of the legiance of Her Majesty are to be "deemed, adjudged, and taken to be natural-born subjects"; 4 Geo. II. c. 21 (1731), s. 1, explains the Act of Anne, and applies it to the children of all natural-born subjects of "the Crown of England and Great Britain"; 13 Geo. III. c. 21 (1773) gives the like privilege to the children of all persons entitled to it by the last-named Act and by that of Anne.

These statutes are now completed, and rendered practically obsolete, by the Naturalisation Act, 1870, 33 & 34 Vict. c. 14 (see *sub voc.* ALIEN; ALIENAGE; DENIZATION). The Legitimacy Declaration Act, 1858, 21 & 22 Vict. c. 93, furnishes a procedure for enabling "persons to establish their right to be deemed natural-born subjects," and provides for the declaration of the legitimacy or of the validity of the marriage of any natural-born subject, or any person whose right to be deemed a natural-born subject depends wholly or in part on his legitimacy, or on the validity of a marriage, being domiciled in England or Ireland. Such persons may claim a declaration of the validity of the marriage of their parents or grandparents under this Act (see *sub voc.* LEGITIMACY). The Extradition Treaty, 1870 (Article 2), excepts "native-born" or naturalised subjects of either Power from extradition; "native-born" is synonymous with "natural-born" (*In re Guerin*, 1889, 37 W. R. 269); the issue of nationality under this Act may be decided by a jury (*Guerin v. The Bank of France*, 1888, 5 T. L. R. 160).

It may be pointed out that the rule of the common law, as stated at the outset, holds, except in so far as statute law has limited or extended it. Thus the status of a "natural-born subject" is still a personal *status*; and though, by the combined force of 7 Anne c. 5, 4 Geo. II. c. 21, and 13 Geo. III. c. 21, s. 1, the children and grandchildren of natural-born subjects have the rights of natural-born subjects, yet this principle goes no lower down in the line of descent; the status is not transmissible to all time (*De Geer v. Stone*, *ut supra cit.*). On the other hand, the abjuration by a natural-born subject of his allegiance will not deprive his son and grandson of the benefit of those Acts (*Fitch v. Weber*, 1847, 6 Hare, 51). The character of a natural-born subject is, as a rule, indelible (*Macdonald's case*, 1747, 18 St. Tri. 857), except in so far as the common law has been modified by statute. The Naturalisation Act, 1870, is not retrospective (*Sharpe v. St. Sauveur*, 1871, L. R. 7 Ch. 343). British nationality is not inherited through women (Dicey, *Conflict of Laws*, 180). British nationality may be acquired after birth, and lost, and resumed, at various periods of life. A woman, being a British-born subject, on marrying an alien ceases to be a British subject. The Naturalisation Act provides means of self-expatriation by a declaration of alienation (Dicey, *Conflict of Laws*, 173 and 740). Marriage in no case affects the nationality of a man. It was contended long ago that the Statute of Edw. III. (*de Nativis ultra mare*) was to be construed disjunctively, and that to give the character of British subject, it was enough that one parent should be a natural-born subject; but this contention was not successful (see *Collingwood v. Pace*, *Calvin's case*, and *Duroure v. Jones*, *ut supra cit.*). An exception was said to exist in favour of the children born to an English merchant, resident abroad, by an alien woman (see *Bacon v. Bacon*, 1641, Cro. (4) 601). The exception does not extend to the children of soldiers serving abroad (*De Geer v. Stone*, *supra cit.*).

The law seems clearly to be now well settled that the mother need not be an Englishwoman (see *De Geer v. Stone*, *ut supra cit.*).

The jurisdiction which the Crown possesses as *pater patriæ* will not be exercised in favour of infants who are not natural-born subjects or entitled to be deemed such (*Brown v. Collins*, 1883, 25 Ch. D. p. 56).

The following cases may also be referred to as generally illustrative of the law and history of the matter:—*Case II.* (4 Hen. III. 1227) (Jenkins' Cases, 1st Century); *Hyde v. Hill*, 1582, Cro. (1) 3; *Craw v. Ramsey*, 1670, Vaugh. 274–301; *Doe d. Thomas v. Acklam*, 1824, 2 St. Tri. N. S. 105; *Countess of Conway's case*, 1834, 2 Kn. 364; *Count Wall's case*, 1834, 3 Kn. 13; *Count De Wall's case*, 1848, 12 Jur. 145.

[*Authorities*.—*Co. Litt.* 8 *a* (Notes 1 and 2) and 129 *a*; Cockburn (Sir A., L.C.J.), *Nationality*; Weightman, *Law of Marriage and Legitimacy*; Westlake, *Private International Law*; Hall, *Foreign Jurisdiction of the British Crown*; Dicey, *Conflict of Laws*, 1896.]

Natural Child.—See WILL, *Judicial Glossary*.

Naturalisation is the procedure by which an alien is made a subject or citizen of any State. It is the act by a nation of adopting a foreigner and admitting him to take part in its national polity. Naturalisations *en masse* take place when territory is annexed by, or ceded to, another State. The status of the inhabitants is usually the subject of special clauses in the treaty determining the conditions of the annexation or cession. It is considered at the present day due to the inhabitants that they should have a right of option, enabling them to retain their existing nationality. Thus the treaty of Frankfort (May 12, 1871) allowed French subjects *originaires des territoires cédés*, that is, Alsace-Lorraine, who were domiciled there, to retain their French nationality. An addition to this (December 11, 1871) added to domiciled inhabitants non-domiciled *originaires*, and a French ministerial circular (March 30, 1872) explained the position as follows: "Consequently all persons born in the ceded territory, whatever their age, sex, or domicile, must make a declaration that they intend to retain their French nationality, and in default of such declaration they shall be considered Germans."

A different system was followed in the treaty of 1798 uniting Geneva to France, which declared all Genevese, wherever domiciled, to be born French.

See for the acquisition of British nationality, BRITISH SUBJECT. See also ALIEN; ALIENAGE.

Natural Person—A term used in antithesis to an artificial or fictitious person, such as a CORPORATION.

Nature, Guardianship by.—See INFANTS, vol. vi. at p. 417.

Nature, Law of.—Laws of nature in the sense of causal laws belong to the domain of science. The term is also applied to a branch of Roman law, and, through it, is met with in the history of International Law (*q.v.*). Justinian's *Institutes* describe the *jus naturale* as that taught by nature to all animal creation, including the human race.

Blackstone, on the other hand, defines the law of nature as a human law. It is the "will of man's Maker."

"For as God," says he, "when He created matter and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when He created man and endued him with freewill to conduct himself in all parts of life, He laid down certain and immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws" (*Commentaries*, 4th ed., 1770, bk. i. p. 39).

Again, Reddie thought :

The only intelligible meaning of the law of nature, in the sense of the jurists, or of law applicable to men in a state of nature, is the law applicable to men, considered with reference to each other, merely as separate individuals, unconnected by the domestic or social union (*International Law*, p. 113).

And see *JUS GENTIUM*.

Nautical Assessors.—See *ASSESSORS*; *COUNTY COURTS*; *TRINITY HOUSE*.

Naval Courts-Martial.—See *COURTS-MARTIAL*; *NAVY*.

Naval Imprisonment and Prisons.—See *COURTS-MARTIAL*; *NAVY*.

Naval Prize.—See *PRIZE*.

Naval Reserve.—The Naval Reserve consists of those forces which are at the disposal of the Admiralty other than the Navy and the Royal Marines (*q.v.*).

These are (1) the Royal Naval Reserve, comprising the Naval Coast Volunteers and the Royal Naval Volunteers; (2) the Royal Naval Artillery Volunteers; (3) the officers and men of the coastguard, revenue cruisers, and the seafaring men of all other public departments; (4) petty officers and seamen of the royal navy who are in receipt of pensions.

(1) (a) Naval Coast Volunteers may be raised by the Admiralty, under the Naval Coast Volunteers Act, 1853 (16 & 17 Vict. c. 73). Their numbers are limited to 10,000, the engagement five years, and they must submit to annual training for twenty-eight days, on shore or on board ship, with the object of fitting them to aid the regular naval forces. They may be called into actual service by proclamation in case of imminent national danger or great emergency, to serve either on shore or at sea for one year, or an additional one by proclamation, but not at a greater distance from shore than 100 leagues (s. 5). By sec. 9 the provisions as to billeting (*q.v.*) of the Royal Marines are applicable during instruction, training, and exercise, or actual service; a naval officer of the rank of commander having the same powers as a colonel or commanding officer of a division of the Royal Marines.

Volunteers who offer themselves for enlistment in the regular forces or militia are liable to imprisonment for not more than six months, and their enlistment is void. Every militiaman so offering to enlist in the volunteers is liable to the same penalty, and his enlistment is void (s. 18). See *ENLISTMENT*.

See secs. 19–24 as to various penalties recoverable on summary conviction for selling, pawning, losing, buying arms, etc., and for not attending training and exercise.

Sec. 21 makes volunteers who do not appear when called upon for actual service liable to be apprehended and punished, as deserters are in the navy. See *NAVY*.

They are subject to the military law of the navy while under instruction, training, and exercise (s. 17).

(b) The Royal Naval Volunteers are raised under the Naval Reserve Act, 1859 (22 & 23 Vict. c. 40), and are not to exceed 30,000 men; their term of service is five years; and they are liable to twenty-eight days' training and exercise, on board ship or on shore. On such occasions as Her Majesty shall deem fit, they may be called into actual service, on shore or ship, for three years, extendible to two additional years by proclamation. There is no limit as to the locality of their service.

By sec. 7 they are exempted from service in the militia, and from serving as peace or parish officers; and a naval coast volunteer may enter, but then ceases to belong to, that service. The Royal Naval Volunteers are eligible, under regulations, to enter into Greenwich Hospital, and to pensions.

Similar provisions are enacted, as above mentioned in the case of the coast volunteers, including the naval volunteers, amongst the persons subject to martial law, enlistment, selling and pawning arms, etc.

(2) *The Royal Naval Artillery Volunteers*.—By the Naval Artillery Volunteer Act, 1873 (36 & 37 Vict. c. 77), the Crown was empowered to accept, through the Admiralty, the services of any persons desiring to be formed under the Act into a Royal Naval Artillery Volunteer corps. The Act is drawn, *mutatis mutandis*, on the lines of the Volunteer Act, 1863 (26 & 27 Vict. c. 65). The officers are commissioned by the Admiralty, and they rank with officers of the Royal Naval Reserve. Except on actual service, and then only under regulations, they are not entitled to take any command over any officers or men of the Royal Navy or Marines, or the Royal Naval Volunteers.

A naval volunteer may quit his corps, except on active service, after fourteen days' notice, on delivering up of his arms, etc., in good order, and paying all money payable under the rules of his corps. A Court of summary jurisdiction for the place in which the headquarters of the corps are situate is given an appellate jurisdiction from the commanding officer's decision relating to these matters (s. 7).

These volunteers may be called out for actual service in the case of actual or apprehended invasion of any part of the United Kingdom, the occasion being first communicated to Parliament, if sitting, and if not, in the proclamation.

Every officer and volunteer, and every officer and petty officer of the permanent staff formed under the Act (s. 2), belonging to every corps so called out, is bound to assemble at such place and embark on board such ships, and perform such service on board ship, or partly on board ship and partly on land, as may be directed by the Admiralty; but no officer (other than one of the permanent staff) or volunteer (unless he otherwise consent) shall be employed, except in ships engaged in the defence of the coasts of the United Kingdom, Channel Islands, and Isle of Man, and on service in the seas adjacent.

As to allowances which may be made upon being called out, see sec. 17 (1); and they are to be paid as the officers, petty officers, and seamen of the navy.

While they are on actual service, or undergoing drill, exercise, training, or inspection, together with, or voluntarily doing any duty together with, the navy or marines or the regular forces, the Naval Discipline Act, 1866 (see NAVY), and all the laws and customs of the navy on actual service, are applied to them by sec. 21; but a court-martial must be composed, partly, at least, of officers of the Naval Artillery Volunteer force.

Under other and ordinary circumstances, see, as to the power of the commanding officer to discharge, etc., from the corps (subject to appeal to the Admiralty), sec. 20.

If an officer, volunteer, or petty officer, while he is on board any of Her Majesty's ships, or on march or duty with the corps or brigade to which he belongs or any part thereof, or is engaged in any exercise or drill therewith, or is wearing the clothing or accoutrements thereof, and is going to or returning from any such ship, place of exercise, drill, or assembly, or is otherwise on duty, disobeys any lawful order of an officer under whose command he is, or is guilty of misconduct, the officer in command may order the offender, if an officer, into arrest, and if not an officer, into the custody of any volunteer belonging to the corps or brigade, or of any petty officer of the permanent staff. But the arrest or custody is not to continue longer than whilst the corps is on duty.

The provisions of the Act as to the power to make rules for the corps, the vesting of property in the commanding officer *ex officio*, the recovery of fines, etc., are practically the same as those under the Volunteer Acts. See VOLUNTEERS.

In regard to the acquisition of land for military purposes, the provisions of the Military Land Act, 1892 (55 & 56 Vict. c. 43), now apply to the Naval Artillery Volunteer corps, as to any other volunteer corps.

Royal Naval Artillery Volunteers (as also the Militia, Naval Coast Volunteers, and Royal Naval Volunteers), by this Act, and by the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25, s. 43), do not lose or forfeit any interest in a friendly society or branch, whether registered or unregistered, which they possess at the time of being enrolled or serving, or are fineable for absence from, or non-attendance at, any meeting of the society, if the absence or non-attendance is caused by the discharge of military or naval duties as certified by the commanding officer, any rules of the society or branch to the contrary notwithstanding. Any dispute by reason of the enrolment or service is to be decided by a Court of summary jurisdiction. While in the course of duty they are exempt from dues and tolls leviable at any port, wharf, quay, landing-place, or bridge, equally with the navy (s. 34).

The pecuniary penalties recoverable under the Act, on the prosecution of the commanding officer, are to be paid to him, and applied as part of the general fund by the corps or brigade (s. 61). He may appear in any County Court or Court of summary jurisdiction, by any officer or petty officer of the permanent staff, or officer or member of the corps or brigade, authorised by him in writing (s. 42).

(3 and 4) See as to the constitution and liabilities of the coastguard service, article COASTGUARD.

By sec. 16 of the Naval Coast Volunteers Act, 1853, whenever any emergency shall arise which, in the opinion of the Admiralty, renders it advisable to require the services in the navy of any of the persons who may have served as petty officers or seamen in the navy, and who are in the receipt of pensions, such pensioners may be ordered to join the navy for such time as the emergency may continue, and be entitled to receive the ordinary pay, according to their rating, as well as their pensions.

See the Colonial Naval Defence Act, 1865 (28 & 29 Vict. c. 14), whereby the colonies are empowered to raise a volunteer force which is to form part of the Royal Naval Reserve, established by the above-mentioned Royal Naval Reserve Act, 1859; also article COLONIAL FORCES.

Naval Testament.—By the Statute of Frauds (29 Car. II. c. 3) and the Wills Act (1 Vict. c. 26), mariners or seamen, being at sea, may dispose of their personal estate as they might have done prior to the former statute, without any of the restrictions thereby imposed. See NUNCUPATIVE WILL.

The words “mariner or seaman” include all engaged in the naval service whatever their rank, *e.g.* a surgeon in the navy is within the exemption, although he was not on duty when the informal will was made, as he was at sea on his return from service (*In the goods of Saunders*, 1865, L. R. 1 P. & D. 16).

Merchant seamen are included within it (*In the goods of Parker*, 1859, 2 Sw. & Tr. 375).

At sea means on maritime service, or returning from it (as in the above case of *Saunders*), and in that case may extend to death on shore, as in *In the goods of Lay*, 1840, 2 Curt. 375, where a seaman at Buenos Ayres went on shore and died there.

A will made by a mariner serving on board H.M.S. *Excellent* whilst she was permanently stationed in Portsmouth harbour, was held to have been made at sea within the meaning of sec. 11 of the Wills Act (*In the goods of M'Murdo*, 1867, L. R. 1 P. & D. 540).

A person living on shore, although holding an appointment in the maritime service abroad, is not within the exception (*Seymour's* case, 1802, cited *In the goods of Hayes*, 1839, 2 Curt. 339, and 3 Curt. 530).

But if the will is made at sea it is operative, although the death of the mariner or seaman takes place on shore (*In the goods of Leese*, 1853, 17 Jur. 216).

As to the proof and probate of these wills, their revocation, etc., the remarks in the article MILITARY TESTAMENT (*q.v.*) are applicable to them also.

In the case of petty officers and seamen in the navy, non-commissioned officers of the marines, and the marines, additional provisions have been made by the Navy and Marines (Wills) Act, 1865 (28 & 29 Vict. c. 72), for the purpose of preventing them from making improvident dispositions of their property.

The Act applies to “seamen and marines,” which is defined as including the above-mentioned persons, and any “other person forming part in any capacity of the complement of any of Her Majesty’s vessels, or otherwise belonging to the naval or marine force”; but is exclusive of commissioned, warrant, and subordinate officers, and assistant engineers, and of Kroomen, a race of Liberian negroes who are much employed on board ship.

1. Their wills made after the Act, but previously to their entering the service, are not valid to pass any wages, prize-money, bounty-money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty.

2. Their wills are not valid for any purpose if written or contained on or in the same paper, parchment, or instrument with a power of attorney.

In regard to the formalities which must be observed, it is provided that, while the above persons are serving, or when they have ceased to serve, their wills shall not be valid to pass any wages, prize-money, bounty-money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty, unless made in conformity with the following provisions:—

- (1) With the ordinary formalities of English law (see WILL).

(2) If made on board one of Her Majesty's ships, one of the two attesting witnesses must be either a commissioned officer, chaplain, or warrant or subordinate officer.

(3) If made elsewhere, one of the two attesting witnesses must either be one of the persons last mentioned, or the governor, agent, physician, surgeon, assistant surgeon, or chaplain of a naval hospital at home or abroad, or a justice of the peace, or the incumbent, curate, or minister of a church or place of worship in the parish where the will is executed, or a British consular officer, or an officer of customs, or a notary public.

In the case of such persons being prisoners of war, a will is operative for all purposes—(1) If it is in writing and is signed, and the signature made or acknowledged in the presence of one witness, who must be either a commissioned officer or chaplain belonging to the naval, marine, or military force, or a warrant or subordinate officer of the navy, or the agent of a naval hospital, or a notary public.

(2) If it is made according to the forms required by the law of the place where it is made.

(3) If it is made with the ordinary formalities of the law of England.

The Admiralty may pay any wages, etc., to any person claiming to be entitled thereto under any will not made in accordance with the above-mentioned provisions, if, having regard to the special circumstances of the death of the testator, they are of opinion that compliance therewith may be properly dispensed with.

An Order in Council of 28th December 1865 provides for a repository of wills at the Admiralty.

The disposal of money and effects under the control of the Admiralty belonging to deceased officers, seamen and marines of the Royal Navy, and marines, is regulated by the Navy and Marines (Property of Deceased) Act, 1865 (28 & 29 Vict. c. 111).

See MILITARY TESTAMENT; PROBATE.

Naval Volunteers.—See NAVY; NAVAL RESERVE.

Nave.—The word nave means the body or middle part, lengthwise, of the church, extending from the west end to the transept or choir. It is derived by some from an Anglo-Saxon word *naf*, which signifies the middle of a wheel, but it is also connected with *váos* or *naris*. Norman churches were built in the form of a cross, with a nave and two wings or aisles (as to which, see article AISLE).

The nave forms part of the body of the church, as distinguished from the chancel. This the parishioners are at common law bound to repair. (See articles AISLE; PARISH CHURCH.)

Of common right, the disposal of seats in the nave rests with the ordinary, and is exercised for him by the churchwardens. (On this subject, see further, article PEWS.)

[*Authorities.*—Bingham's *Antiquities of the Christian Church*; Gibs. *Cod.*; Burn, *Eccles. Law*; Phillimore, *Eccles. Law*, 2nd ed.]

Navigable River.—See RIVERS (INTERNATIONAL); WATERWAY.

Navy.

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INTRODUCTORY.

The navy as a permanent institution provided for out of the national revenues, and with its officers and men regularly engaged in the service of the Crown, may be dated from the reigns of Henry VII. and Henry VIII.; but it did not become the chief maritime force of the country until about the middle of the seventeenth century. Up to the latter period it had been maintained and employed rather as an auxiliary to the forces raised, at the outbreak of war, by the seaports and maritime towns which, under various conditions, were under obligations to furnish quotas of ships for the king's use, upon notice being given to them to assemble (see CINQUE PORTS). When so assembled they were placed under the command of officers appointed by the king; and the soldiers raised by the feudal levies were the principal fighting force. The periods of the thirteenth and fourteenth centuries are important in connection with the growth of the navy, and its organisation under royal officers, by the creation of the officers known as admirals exercising the Crown's jurisdiction by sea, and in 1360 by the appointment of a single high admiral (see ADMIRAL and ADMIRALTY). Whether for the royal ships alone, after a navy had been established, or for the earlier naval forces raised by requisition, levied by the Crown or furnished by private enterprise, naval ordinances were issued as each expedition was sent out. The Lord High Admiral, or the officer placed in command, issued specific instructions placing the persons serving under military law (*q.v.*); and in the course of time a collection of precedents of offences and punishments grew up, which under the Commonwealth and during the reign of Charles II. (13 Car. II. c. 9) were embodied in Articles of War which served for the government and discipline of the navy both in war and peace, and were the foundation of the Naval Discipline Acts under which the navy is at present governed (*infra*). To these articles were also due the first establishment of naval courts-martial found in the history of the navy, in place of the summary powers which used to be exercised by commanders and captains during earlier periods.

The administrative duties of the Admiralty with regard to the navy, as distinguished from its control over the administration of the military law, as well as the jurisdiction of the Admiralty Court, now the Admiralty Division, are treated in the articles ADMIRALTY and ADMIRALTY DIVISION (*q.v.*); and this present article will deal with the subjects of (I.) service in the navy; (II.) the law to which it is subject for the maintenance of discipline; (III.) the naval Courts by which this law is administered.

I. SERVICE IN THE NAVY.

Officers receive their commissions from the Board of Admiralty (*q.v.*), and the prohibition as to sale and purchase in 5 & 6 Edw. VI. c. 16, and 49 Geo. III. c. 126, applies to them; but the limited exemption allowed to purchase and sale of commissions in the army has never applied to them (see COMMISSION).

As to the manning of the fleet by impressment of men and seizure of

vessels, which is still lawful in war time, and the statutory exceptions, see article IMPRESSMENT.

By the Naval Enlistment Act, 1835 (5 & 6 Will. iv. c. 24), no person is liable to be detained in the naval service against his consent for longer than five years, unless he voluntarily enters for a longer term. If he becomes entitled to discharge when his ship is abroad, and he signifies his desire not to continue longer in the service, he must be discharged forthwith, or, if he desire it, be sent in some ship of Her Majesty to some port of the United Kingdom, and there discharged. There is power, however, to detain him for six months in any special emergency or hazard to the public service. Sec. 9 also provides for discharge on a seaman providing one able seaman, or two able-bodied landsmen in his stead. This Act was extended by the Naval Enlistment Act, 1853 (16 & 17 Vict. c. 69, s. 1), to men who, under Admiralty regulations, entered for a term of ten years, or other term of continuous and general service. Able and ordinary seamen, however, are seldom taken directly into the navy, provision having been made by the last-mentioned Act for the training of boys, who form, in ordinary times, the chief recruiting supplies.

By sec. 2 of that Act it is provided that every boy entering when under eighteen should be entered, and liable to serve, until the age of twenty-eight years; and every person who, when of the age of eighteen years or upwards, should be entered as a boy, should be entered for ten years' continuous and general service.

To encourage seamen and others to enter the navy, sec. 4 provides that after proclamation calling for their services being published at any port, during peace or war, seamen who volunteer for the navy are entitled to bounties in such manner, and according to such classes, as may be fixed by the proclamation; and by similar proclamation their term of service can be extended to an additional period of five years.

By the Service of Seafaring Men Act, 1853 (16 & 17 Vict. c. 73), in case of emergency, officers and men of the coastguard, revenue cruisers, and naval pensioners may be required to serve in the navy for a limited period, but not longer than for five years, without their consent; and while serving they are entitled to the same pay and allowances as if they had been entered for ten years in the ordinary way, and pensioners continue to receive their pensions. In case of actual invasion, or imminent danger thereof, officers and men in the customs, and all other public departments, who are of a seafaring character, become liable to serve for one year, on the like terms.

As to the ordering of the Naval Coast Volunteers and the Naval Reserve into actual service, see article NAVAL RESERVE.

Moreover, by sec. 8 of the Naval Enlistment Act, 1835, colonial seamen who volunteer to serve in the navy for the regular term are, after their discharge, entitled, if they desire to return to their native colony, to be conveyed thither free of expense, or are allowed a gratuity in money sufficient to cover the cost of their return, according to the discretion of the Admiralty.

The Naval Enlistment Act, 1884 (47 & 48 Vict. c. 46), modified the above Enlistment Acts by providing that as to the term of ten years this should no longer be fixed by statute, but that the Admiralty might make regulations enabling men to be entered or re-entered for periods to be fixed by those regulations.

In respect of boys, it also provided that the entry might be for continuous and general service for such period, not exceeding twelve years, or,

if they enter below the age of eighteen, not exceeding the time required for them to attain the age of thirty years, as might be fixed by such regulations.

The Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 28, enables guardians to pay out of their funds such sums as may be required by the regulations of the navy on the entry of boys, for providing outfit or otherwise to enable any boy not already an apprentice in the merchant service, who or whose parents are receiving relief, to enter into the navy, and to incur all other expenses necessary for carrying out that object.

By sec. 4 of the Act of 1884, the liability of petty officers and seamen in receipt of pensions, to service in the navy in cases of emergency, was extended to persons enlisted or re-engaged after the passing of the Act, who have served as non-commissioned officers and men of the Royal Marines (*q.v.*), and are in receipt of pensions; unless they have enlisted in the Army Reserve Force (see RESERVE FORCES).

The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 195–197, provides that a seaman may leave his ship and join the navy without being guilty of desertion, or liable to any punishment or forfeiture; any stipulation in any agreement to the contrary is void, and a master or owner is liable to a fine not exceeding £20 for causing any such stipulation to be introduced.

There are also provisions for obtaining the seaman's effects from the master, and payment of any wages due, with penalties on the master for their contravention.

For the offences of entering the navy from the regular forces or militia, see ARMY; ENLISTMENT, vol. v. at p. 29; MILITIA.

False answers made upon entering the naval service, with intent to deceive any officer or person authorised to enter or enlist seamen or others, are punishable under the Vagrancy Act, 1824 (5 Geo. IV. c. 83, s. 3), by sec. 16 of the Naval Enlistment Act, 1853.

The oath of allegiance is not administered to entrants in the navy as it is in the case of enlistment in the army and other land forces.

The Admiralty has the right to discharge any seaman or other person at any time from the naval service, if their services are not required; and discharge may also follow as a punishment on conviction by court-martial (*infra*). Until actual discharge in due form, they remain subject to the discipline of the navy, and to the laws relating thereto.

If, after service for the regular period for which they enlisted, they are discharged at a time when a proclamation is in force requiring the services of seafaring men, they are entitled to receive from the captain or commanding officer of the ships from which they are discharged, certificates of their services, and the Admiralty thereupon issue a protection from service in the navy for two years; but if discharge takes place (except upon the seaman's own application) before the end of the regular term of service, the protection only lasts for one year.

The forging or counterfeiting any such certificate, or in any fraudulent manner causing a certificate to be issued, is a misdemeanour (Naval Enlistment Act, 1835, ss. 1, 2, 3).

The provisions of sec. 91 of the Army Act, 1881 (44 & 45 Vict. c. 58), relating to the sending of lunatic soldiers, by a Secretary of State, to work-houses and lunatic asylums, and other places in which lunatics can be confined, are applied by sec. 3 of the Naval Enlistment Act, 1884, to persons in the naval service. The Admiralty is to be read for Secretary of State,

and the declarations made on a person entering into the naval service as a boy, by his parent or guardian, or made by a man on entering such service, are respectively substituted for the attestation paper.

As to the provisions for pensions, pay, etc., see PAY AND PENSIONS, MILITARY AND NAVAL.

II. THE MILITARY OR CRIMINAL LAW OF THE NAVY.

The discipline of the navy is provided for by the Navy Discipline Act, 1866 (29 & 30 Vict. c. 109), and the Naval Discipline Act, 1884 (47 & 48 Vict. c. 39). They specify all the offences punishable by naval law, and the punishment annexed thereto, except that all crimes not capital, or punishable with penal servitude under the Acts, may, unless the Acts provide otherwise, be punished according to the laws and customs in such cases used at sea (s. 44 of the Act of 1866).

The articles of war specifying the offences are contained in Part I. of the Act of 1866, and they comprise, firstly, offences purely against discipline, which would not be punishable under the ordinary law; and, secondly, offences which are crimes under the ordinary law, but made punishable also by the naval courts-martial, or summarily, under the Act.

Many of the offences under the first class are punishable with death, but in every case now one of the alternative punishments prescribed in sec. 52 can be substituted. This is the case also with those serious offences for which penal servitude is prescribed; that principle in fact being applied to every specified punishment.

Under the second class, murder is punishable with death; manslaughter, with penal servitude, or such other punishment as thereafter mentioned; sodomy, with penal servitude; indecent assault, with penal servitude, or such other punishment as thereafter mentioned; robbery or theft, with penal servitude, or such other punishment as thereafter mentioned.

The above, it will be noticed, do not follow the scale of punishments prescribed under the ordinary law. But sec. 45 provides that other offences may be punished either as prejudicial to good order and discipline (s. 43), or with the same punishment as an ordinary criminal tribunal would award.

The following is the scale of punishments arranged according to degree; and where one punishment is specified but another punishment may be awarded, any one or more of the punishments inferior in degree may be awarded (s. 55):—

1. Death.
2. Penal servitude—life or not less than five years.
3. Dismissal from the service with disgrace; involving in all cases forfeiture of all pay, annuities, pensions, medals, and all other rights of a like kind, and an incapacity to serve in any military, naval, or civil service; and it may be accompanied with imprisonment.
4. Imprisonment, not exceeding two years; or corporal punishment, not more than forty-eight lashes; no officer being subject to it, and no petty or non-commissioned officer, except in case of mutiny.
5. Dismissal from the service.

Other five relate to punishments such as forfeiture of seniority and pay, etc.

Such minor punishments as are now inflicted according to the custom of the navy, or may from time to time be allowed by the Admiralty.

Upon a charge of any offence the prisoner may, upon failure of proof of the commission of the greater offence, be found guilty of another offence of

the same class involving a less degree of punishment, but not of any offence involving a greater degree of punishment (ss. 47, 48).

Unless an offender has avoided apprehension, or fled from justice, the trial must take place within three years from the commission of the offence, or within one year after the return of the offender to the United Kingdom (s. 54).

All the offences specified may be tried and punished under the Act (s. 46) if they are committed—

(a) Whether in or out of the United Kingdom, in any harbour, haven, or creek, or on any lake or river.

(b) Anywhere within the jurisdiction of the Admiralty.

(c) At any place, on shore, out of the United Kingdom.

(d) In any of Her Majesty's dockyards, victualling yards, steam factory yards, or on any gun wharf, or in any arsenal, barrack, or hospital belonging to Her Majesty—whether in or out of the United Kingdom.

(e) The offences of "misconduct in the presence of the enemy," "communications with the enemy," "neglect of duty," "mutiny," "insubordination," "desertion and absence without leave," or "miscellaneous offences"—whether in or out of the United Kingdom.

Every officer in command of a fleet or squadron or of a ship, or the senior officer present at a port, may by warrant under his hand authorise any person to arrest any offender subject to the Act for any offence against the Act mentioned in the warrant. Such person may be taken on board the ship to which he belongs, or some other of Her Majesty's ships; and force may be used for effecting the apprehension (s. 50).

In *R. v. Cuming and Another*, 1887, 19 Q. B. D. 13, it was held that a naval officer being subject to the Act might arrest an offender without this warrant.

As to the apprehension of deserters by any constable, or any person in Her Majesty's service, their examination by a justice of the peace in any part of Her Majesty's dominions, and their committal to prison pending their deliverance into the custody of the naval authorities, see the Naval Deserters Act, 1847 (10 & 11 Vict. c. 62); and article DESERTION.

The persons subject to the Act, and who are made liable thereto, and triable and punishable thereunder, are the following:—

1. Every person in, or belonging to, the navy, and borne on the books of any of Her Majesty's ships in commission—that is equipped, and in service—at the time of the offence.

2. Her Majesty's land forces, when embarked upon any of Her Majesty's ships, under such regulations as may be made by Order in Council.

The order at present in force is one made on the 6th February 1882.

3. All other persons ordered to be received or being passengers on board any of Her Majesty's ships, under such regulations as the Admiralty may from time to time direct.

4. Persons on the books of hired vessels in Her Majesty's service in time of war, being either armed or under the command of a naval officer, if the Admiralty think fit so to direct.

5. The crews of any of Her Majesty's ships wrecked, lost, or destroyed, or taken by the enemy.

6. All spies for the enemy.

7. All persons, not otherwise subject to the Act, *e.g.* civilians, who, being on board any ship of Her Majesty, shall endeavour to seduce from his duty or allegiance any person subject to the Act.

8. The Royal Naval Coast Volunteers (*q.v.*), under the Act 16 & 17 Vict.

c. 73; and the Royal Naval Volunteers (*q.v.*), under the Act 22 & 23 Vict. c. 40, when they are respectively in actual service or under training.

9. The classes of persons who, as before mentioned, may be required to serve in the navy, when so required to serve.

10. Officers of Reserve to the Royal Navy, under the Officers of Royal Naval Reserve Act, 1863 (26 & 27 Vict. c. 70), when called out for training or exercise, or on actual service.

11. Officers and volunteers of the Naval Artillery Volunteers established under 36 & 37 Vict. c. 77, and officers and petty officers of the permanent staff thereof, when on actual service, or undergoing drill, exercise, training, or inspection, together with the navy or marines, or the regular forces, or any part thereof.

III. NAVAL COURTS ADMINISTERING THE LAW.

These Courts are either courts-martial, or the Courts of officers in command of ships, whose jurisdiction is derived exclusively from the Naval Discipline Acts over the persons, and the offences committed within the times and places, above described.

Any offence triable under the Acts may be tried and punished by court-martial whether committed by officers or men.

Sec. 1 of the Act of 1884 provides that any offence not capital triable under the Acts, and which is not committed by an officer, may, under such regulations as the Admiralty may make, be summarily tried and punished by the officer in command of the ship to which the offender belongs at the time, either of the commission of the crime, or at the trial of the offence, subject to the restriction that the commanding officer shall not have power to award penal servitude, or to award imprisonment for more than three months. This does not include power to inflict corporal punishment, except for mutiny, unless the offence has been inquired into by one or more officers appointed by the commanding officer, and his or their opinion as to the guilt or innocence of the prisoner reported to him, whereupon the commanding officer is to act as according to his judgment may seem right (s. 56 of the Act of 1866).

Other persons besides commanding officers who may exercise those summary powers are described in subsec. 3 of sec. 1 of the Act of 1884.

There is no legal right to demand a court-martial; and it is in the discretion of the authority empowered to order such a Court to be held, whether, upon formal application containing the charge or complaint, and other matters as prescribed in the regulations, a trial shall be granted.

In the United Kingdom, the Admiralty is the authority exercising this power. It may also grant commissions to any officer of the navy on full pay, authorising him to order these Courts to be held; and these commissions are granted to commanders-in-chief on foreign stations, and commanders of detached squadrons. Under circumstances detailed in subsecs. (11) and (12) of sec. 58 of the Act of 1866, senior officers of division may be empowered by the commander-in-chief to assemble courts-martial. Subsec. (10) also provides that where at any place there is an officer superior in rank to the officer empowered to order a court-martial, the officer of superior rank may, without a commission for that purpose, order a court-martial. The officer ordering cannot sit as a member of the Court. The president is named by the authority ordering the Court, or this is intrusted in the home ports to the commander-in-chief at the port, or abroad to the senior officer present, when the commander-in-chief is not at the place. The order for the Court is addressed to the president, to whom are sent the

charge and other documents. In the absence of the Judge Advocate of the Fleet or deputy, or a special appointment by the Admiralty, the president appoints a judge advocate for the trial (see, as to the duties of this official, article JUDGE ADVOCATE). The president (if the officer ordering the court-martial is not present at the place where it is held) appoints a provost-marshal (*q.v.*) to arrest and keep the prisoner in custody.

A court-martial cannot be held unless at least two ships, not being tenders, and commanded by captains, commanders, or lieutenants on full pay, are together when the court-martial is held. General orders are given or signalled, and all officers junior to the president, of a rank eligible to sit on a court-martial, must be present, unless they are absent with leave.

The Court must consist of not less than five nor more than nine officers.

No officer is qualified to sit unless he be a flag officer, captain, commander, or lieutenant on full pay, and not under twenty-one years of age. If the prisoner is a flag officer, the president must also be a flag officer, and the other officers either of the rank of captain or of higher rank; and if a captain, the president must be a captain or of higher rank, and the other officers commanders or officers of higher rank. If the prisoner is below the rank of captain, the president must be a captain or of higher rank; and if the prisoner is of the rank of a commander, in addition to the president two other members of the Court must be of the rank of commander or of higher rank (s. 2 of the Act of 1884).

The prosecutor cannot sit on any court-martial for the trial of the prisoner whom he prosecutes (subs. (8), s. 58).

The Court must be held on board a ship or vessel of war (s. 59).

A right of objection to members of the Court is allowed (s. 62).

As to the oaths taken by members, see JUDGE ADVOCATE.

The procedure is laid down in the Admiralty Regulations.

All persons summoned and attending as witnesses are privileged from arrest while attending, going to, and returning from, the Court. Civilian witnesses not attending, refusing to be sworn, or affirm, or give evidence, or answer legal questions, or prevaricating, shall, upon certificate under the hand of the president, be liable to be attached in the High Court, as if they had been summoned and subpœnaed in that Court. In the case of a naval witness, the court-martial may punish non-attendance, or refusal to give evidence, or prevarication, with not longer than three months' imprisonment, and not longer than one month for behaving with contempt of the Court (s. 66).

Perjury before a court-martial is punishable as in other cases (s. 67).

In the case of a sentence of death, four at least of the officers present where the number does not exceed five, and in other cases a majority of not less than two-thirds, must concur (s. 53, subs. (2)).

If the sentence is one of penal servitude, it has the same effect as a like sentence by a civil Court; and the prisoner is to be taken to some prison in which a convict sentenced by a civil Court can be confined (s. 3 of Act of 1884).

Sentences may be passed to take effect on the conclusion of a previous sentence, but this is not to cause a person to undergo imprisonment for exceeding two consecutive years (s. 4).

The place of imprisonment may be in one of the naval prisons under the Acts, or any common gaol, house of correction, or military prison (*q.v.*) within Her Majesty's dominions (s. 74 of the Act of 1866, and s. 5 of 1884).

By sec. 81 of the Act of 1866, the Admiralty may set apart any buildings or vessels, or any parts thereof, as naval prisons, which are to be deemed

naval prisons within the meaning of the Act; and sec. 6 of the Act of 1884 provides that the Admiralty shall have the same power in respect to them as a Secretary of State has in relation to military prisons (*q.v.*).

If a prisoner becomes insane, he may be removed under warrant of the Admiralty to a lunatic asylum for the unexpired term (s. 80).

In regard to approval and confirmation of sentences, and remission, mitigation, alteration, or commutation; the control of the High Court over courts-martial; and generally as to these Courts, see article COURTS-MARTIAL.

See ADMIRAL; ADMIRALTY; CINQUE PORTS; COURTS-MARTIAL; DESERTION; ENLISTMENT; IMPRESSMENT; JUDGE ADVOCATE; MILITARY CUSTODY; MILITARY LAW; MARTIAL LAW; OFFICERS (MILITARY AND NAVAL); PROVOST-MARSHAL.

[*Authorities.*—Thring, *Criminal Law of the Navy*; article "Navy," *Encyc. Brit.*]

Navy and Prize Agents.—By the Naval Agency and Distribution Act, 1864 (27 & 28 Vict. c. 24), every ship of war whilst in commission must have an agent appointed by the commanding officer of the ship, to be styled the Ship's Agent.

No person in Her Majesty's service, or being a proctor or solicitor, can be appointed. A partnership or incorporated body may be. The appointment is not affected by a change of the commanding officer of the ship. An agent must have a place of business within five miles of the General Post Office. He is subject to the jurisdiction of the Court of Admiralty (see ADMIRALTY DIVISION), as if he were an officer of the Court.

His duties are to do all things necessary or proper on behalf or in the name of the ship or of the officers and crew thereof, or any of them, in the following matters:—

1. Salvage services, under the Merchant Shipping Acts.
2. Breaches of any law respecting national character or otherwise relating to merchant shipping.
3. Seizures for breach of any law relating to the customs.
4. Seizures or captures under any Act relating to the abolition of the slave trade.
5. Attacks or engagements with pirates.
6. Captures, recaptures, or destruction of any ship, goods, or thing in time of war or hostilities.
7. Special services or other matters in respect whereof any grant, reward, or remuneration is payable.

The costs, charges, and expenses of the officers and crews and of the agent properly chargeable must be taxed before the distribution of the money distributable.

The money must be distributed according to the provisions of any Act of Parliament applicable, or of the Proclamation or Order in Council, if there is no such Act.

The shares to which officers or crews are entitled must be paid according to the regulations in force made by Order in Council.

The agent is entitled to be furnished, on payment, with copies of or extracts from any official accounts kept under the Act in relation to any ship for which he is agent.

The agent is entitled to receive a percentage of $2\frac{1}{2}$ per cent. on the net amount actually distributable, as his sole and full remuneration for his services in the case.

Where more than one ship is concerned, or the agent is changed pending proceedings, the percentage in case of difference is to be apportioned by the registrar of the Court.

See PRIZE.

Navy Bills.—Navy bills were bills of exchange at one time authorised to be drawn by certain officers upon the Commissioners of the Navy for their pay and expenses; or they were issued by these Commissioners or the Commissioners of the Victualling Board to contractors for the payment of stores, provisions, victualling, etc., of the navy.

The Admiralty Acts, etc., Repeal Act, 1865 (28 & 29 Vict. c. 112), repealed the Acts under which the system of raising pay, etc., by navy bills had been in force as obsolete. See PAY AND PENSIONS, MILITARY AND NAVAL.

The Admiralty Act, 1832 (2 & 3 Will. IV. c. 21), provided that whenever the Commission of the Navy and Victualling Board should be revoked, the Admiralty (*q.v.*) should exercise their powers. Under Admiralty administration and the present public financial system, navy bills in the old sense are no longer in use.

Ne admittas.—See QUARE IMPEDIT.

Near; Nearer; Nearest.—The word “near” is used chiefly in such phrases as “in or near” (see *A.-G. v. Horner*, 1885, 11 App. Cas. 66) in regard to MARKETS AND FAIRS, vol. viii. p. 221, and “near relations” (see RELATIONS; RELATIVES). A point as regards “nearer” arises, under sec. 89 of the Highway Act, 1835, as to legal diversion of highways (see HIGHWAYS, vol. vi. at pp. 196, 197; and *R. v. Shiles*, 1840, 10 L. J. M. C. 157; *R. v. Phillips*, 1866, L. R. 1 Q. B. 648; also Stroud, *Jud. Dict.*). “Nearest” is synonymous with NEXT (*Smith v. Campbell*, 1815, 19 Ves. 400; 13 R. R. 224; and cp. *A.-G. v. Horner*, 1883, 14 Q. B. D. 245).

Near thereto as she may safely get.—See SO NEAR AS SHE MAY SAFELY GET.

Necessaries.—See CONTRACT, vol. iii. at p. 342; HUSBAND AND WIFE, vol. vi. at p. 283; INFANTS, vol. vi. at p. 413. See also next article.

Necessaries (Ship's).—This term has the same meaning in Admiralty as it has at common law (see NECESSARIES) in relation to ships (*Webster v. Seekamp*, 1821, 4 Barn. & Ald. 32; 23 R. R. 307; *The Riga*, 1872, L. R. 3 Ad. & Ec. 516). Strictly, it comprises only anchors, cables, rigging, and the like (*The Sophie*, 1842, 1 Rob. W. 369); but it has been extended to everything required for a ship's service, and is no longer confined to things absolutely and unconditionally necessary for a ship to put to sea (*The Perla*, 1858, Swa. Ad. 353, 354). The term means primarily indispensable repairs, anchors, and cables, and sails, when immediately necessary, and provisions (*The Comtesse de Frégeville*, 1861, Lush. 329)—and it seems that

there is no difference between necessities for the ship and necessities for the voyage (*The Riga*, above, 522)—and it may be defined generally as whatever is fit and proper for the service on which a ship is engaged, and whatever the owner of that vessel as a prudent man would have ordered if present at the time (Dr. Lushington, *The Alexander*, 1842, 1 Rob. W. 360).

The term has been held to include coals furnished to a steamship (*The West Friesland*, 1860, Swa. Ad. 454; *The Comtesse de Frégevill*, above); provisions (*The N. R. Gosfabrick*, 1858, Swa. Ad. 344); clothing for the crew (*The W. F. Safford*, 1860, Lush. 69); a screw propeller (*The Flecha*, 1854, 1 Sp. 441); coppering the ship (*The Perla*, 1858, Swa. Ad. 354; *The Turliani*, 1875, 2 Asp. 603); money advanced for procuring necessities (*The Sophie*, 1842, 1 Rob. W. 369; *The Onni*, 1860, Lush. 154; *The Anna*, 1876, 1 P. D. 253); money advanced to pay dock dues (*The St. Lawrence*, 1880, 5 P. D. 250); money paid for premiums of insurance on freight effected by order of and for the benefit of the shipowner (*The Riga*, 1872, L. R. 3 Ad. & Ec. 516, 523); and money advanced for paying off a shipwright's lien (*The Albert Crosby*, 1870, L. R. 3 Ad. & Ec. 37). It does not include the expenses of an agent travelling from Newcastle to London to help the ship's master in an Admiralty suit (*The Bonne Amelie*, 1865, L. R. 1 Ad. & Ec. 19); nor money advanced to the master to pay averages (*The Aaltje Willemina*, 1866, L. R. 1 Ad. & Ec. 107); nor premiums of insurances on the ship (*The Heinrich Bjorn*, 1883, 8 P. D. 151); nor money advanced to pay a debt already incurred for necessities (*The N. R. Gosfabrick*, 1858, Swa. Ad. 344); nor a broker's commission on a charter-party for a future voyage effected while the ship is at sea under another charter-party (*The Marianne*, 1891, 7 Asp. 34). Nor will the Court allow to be enforced as necessities the payment of a balance due on an ordinary mercantile account between a shipowner and his agent, although that account includes payments for necessities for the ship, e.g. coals (*The West Friesland*, above; *The Comtesse de Frégevill*, above; *The Panthea*, 1871, 1 Asp. 136).

Previously to 1840 the Admiralty Court had no jurisdiction either *in rem* or *in personam* over claims by material men, as they were called, or persons furnishing repairs or supplies to a ship, furnished under a contract made within the body of a county (*The Zodiac*, 1825, 1 Hag. Adm. 325), or in a foreign country (*Palmer's case*, Hob. 79, 212; *Bridgeman's case*, *ibid.* 11); but only if such contract was made on the high seas (*The Case of the Admiralty*, 1610, 12 Coke, 79; *Justin v. Ballam*, 1701, 2 Raym. (Ld.) 805, 1453; *Watkinson v. Barnardiston*, 1726, 2 P. Wms. 367); and the Court had no jurisdiction, where a ship had been sold in a suit instituted by other parties, to allow necessities men to claim against the proceeds, though this had been the practice for fifty years (*The Neptune*, 1835, 3 Kn. 94; and see per Lord Stowell, *The Zodiac*, *ante*). At common law a material or necessary man has only a possessory lien on the ship which he has repaired, arising out of and dependent upon his having possession of the ship for that purpose, e.g. a shipwright (*Raitt v. Mitchell*, 1815, 4 Camp. 146); but this lien is superior to all liens, maritime or not (see MARITIME LIEN), which are not actually attaching to the ship when she comes into the shipwright's hands (*The Gustaf*, 1862, Lush. 506).

By the Admiralty Court Act of 1840, s. 6, however, the Admiralty Court was given jurisdiction to decide all demands and claims whatsoever for necessities supplied to any foreign ship or seagoing vessel, and to enforce payment thereof, whether such ship or vessel may have been within the

body of a county or upon the high seas at the time when the necessities were furnished in respect of which such claim is made. Under this enactment it has been held that a ship built and registered at New Brunswick in Nova Scotia is not a foreign seagoing vessel (*The Ocean Queen*, 1842, 1 Rob. W. 457); and the Court has jurisdiction over a claim for necessities supplied to a Belgian ship in the Thames (*The Flecha*, 1854, 1 Sp. 441), or a Dutch ship at Stornoway in Scotland and at Liverpool (*The Afina del Lange*, 1859, Swa. Ad. 514), or an American ship at the Cape of Good Hope (*The Wataga*, 1856, Swa. Ad. 165), or a Norwegian ship in the port of Quebec (*The Anna*, 1876, 1 P. D. 253), or a Turkish ship at Algiers and Alexandria (*The Mecca*, [1895] Prob. 95); but the port, if foreign, must be part of the "high seas," or the ship is not amenable to the jurisdiction (*The India*, 1863, 32 L. J. Ad. 185, foreign ship supplied at Malaga; *The Ocean*, 1845, 2 Rob. W. 368, articles supplied to a ship building in a foreign dock; *The Mecca*, above, 108, 112). A necessary man has a lien on the ship *in rem* by this statute, but not a maritime lien (*The Heinrich Bjorn*, 1886, 11 App. Cas. 270).

In 1861 the second Admiralty Court Act was passed, to extend the Admiralty jurisdiction; and sec. 5 provides that the Admiralty Court should have jurisdiction over any claim for necessities supplied to any ship elsewhere than in a port to which the ship belongs, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner is domiciled in England or Wales. These words give a jurisdiction in respect to necessities supplied to a ship whether foreign or British (subject to the proviso above) in a British or foreign port (*The Mecca*, above, overruling *The Ella A. Clark*, 1863, B. & L. 33, and *The India*, 1863, 32 L. J. Ad. 185). The fact that the shipowner is absent from the country when the suit is instituted does not prevent his being "domiciled" here if he intends to return, and there is no jurisdiction in such a case (*The Pacific*, 1864, B. & L. 243). This section gives no maritime lien; and thus a necessary man not in possession of the ship has his claim postponed to that of a mortgagee, whether the mortgage is prior in time to the supply of the necessities or not (*The Pacific*, above; *The Two Ellens*, 1871, L. R. 3 Ad. & Ec. 345; 4 P. C. 161, 8).

By sec. 4 of the same Act it is provided that the Admiralty Court shall have jurisdiction over any claim for building, equipping, or repairing of any ship if, at the time of the institution of the cause, the ship or her proceeds are under the arrest of the Court; and if the material man becomes insolvent, but previously assigns his cause of action to his trustee in bankruptcy, the material man can still sue as trustee for his creditors though the cause is not instituted till after the assignment (*The Wasp*, 1867, L. R. 1 Ad. & Ec. 367). The lien in an action *in rem* to enforce such a claim is not a maritime one (*The Two Ellens*, above), but takes effect from the moment of the arrest of the ship; and thus in a case where a ship had been arrested by her master for wages and disbursements, and a necessities man began an action *in rem* against the ship, and the ship was owned by a company which after the arrest was ordered to be wound up, it was held that the proceeds of the ship which had been sold were liable to the necessities man, and did not belong to the liquidator (*The Cella*, 1888, 13 P. D. 82).

The same Act also provided by sec. 5, that in all actions instituted under it, unless the plaintiff recovered £20 he lost his costs, unless the judge certified that the cause was a proper one to be tried in the Admiralty Court; but now such costs are in the discretion of the Court

(*Garnett v. Bradley*, 1877, 3 App. Cas. 944; see Costs, *Admiralty*). The jurisdiction under this Act may be exercised either *in rem* or *in personam* (s. 35).

County Courts, including the Passage Court of Liverpool and the City of London Court, have jurisdiction over necessities claims (a) in any cause where the claim does not exceed £150, or (b) in any cause where a larger sum is claimed, if both parties consent to the Court exercising such jurisdiction (County Courts Admiralty Jurisdiction Act, 1868, s. 3): such Courts having no more jurisdiction in respect to necessities than the Admiralty Court had at the passing of the Act of 1868 (*The Dowse*, 1870, L. R. 3 Ad. & Ec. 135; *Allen v. Garbutt*, 1880, 6 Q. B. D. 165).

Necessaries claims, in order to be enforceable, must be incurred under circumstances under which the shipowners would be liable at common law (*The West Friesland*, 1860, Swa. Ad. 454); and the person ordering necessities must have authority, express or implied, to bind the shipowner (*The Alexander*, 1842, 1 Rob. W. 360). This is generally the master, who has a lien against the ship for his proper disbursements on her behalf (see SHIPMASTER), or may be the managing owner (see SHIP). But the necessities need not have been furnished on personal credit (*The Perla*, 1858, Swa. Ad. 353; *The Onni*, 1860, Lush. 154), nor on the credit of the actual owners of the ship, for these may have allowed other persons to act as owners of the ship, and thus to bind them for contracts properly entered into by the master in the ordinary course of his employment on account of the ship (*The Ripon City*, [1897] Prob. 226). A mortgagee in possession of a ship is not liable unless he has authorised their being procured (*The Troubadour*, 1866, L. R. 1 Ad. & Ec. 302). An agent or part-owner may sue the ship for necessities which he has supplied (*The West Friesland*, above; *The Underwriter*, 1868, 1 Asp. 127), subject to their not forming part of an account between him and the other shipowners.

Where there are several necessities claimants, the proceeds available, if short of what is required to satisfy them in full, are divided among them *pro rata* (*The Desdemona*, 1856, Swa. Ad. 158). No preference is given to the order in which the suits have been begun, but priority is given to a claimant who first gets judgment (*The W. F. Safford*, 1860, Lush. 69). These rules, however, only apply if the parties are *in pari conditione*, i.e. are all necessary men (*The Markland*, 1871, L. R. 3 Ad. & Ec. 340); and the decree may be, as usually it is, "without prejudice to other claims against the vessel, and reserving all questions as to the priority of such claims," in which case the claimants share *pro rata* in the proceeds (*The Africano*, [1894] Prob. 141).

A necessities claim is postponed to a mortgage (*The Scio*, 1867, L. R. 1 Ad. & Ec. 353), even though the former includes wages paid for a crew at the master's request (*The Lyons*, 1887, 6 Asp. 199); and to a bottomry bond, though the necessities were supplied previously to giving the bond (*The W. F. Safford*, ante). A claim for necessities is merged in a bottomry bond granted in respect of the same subject-matter, and a County Court which would have jurisdiction over the claim as necessities has no jurisdiction over it as bottomry (*The Elpis*, 1872, L. R. 4 Ad. & Ec. 1). But a necessities man who, at the request of the master, has advanced money to pay dock dues for the ship at the port of discharge, is entitled to priority over a bottomry bond given at the port of loading (*The St. Lawrence*, 1880, 5 P. D. 250); and a necessities man supplying necessities on the order of the master is entitled to be paid out of the proceeds of ship and freight in

priority to a claim by the master for wages and disbursements (*The Jenny Lind*, 1872, L. R. 3 Ad. & Ec. 529). A material man supplying necessities under circumstances not giving a maritime or statutory lien on the ship, has no equity against the ship as against a purchaser though he buys her with notice of that necessities claim, and is benefited by the ship's increased value thereby (*The Aneroid*, 1877, 2 P. D. 189).

[*Authorities.*—Williams and Bruce, *Admiralty Practice*; Abbott, *Shipping*.]

Necessary.—Where a defendant is under terms to take “short notice of trial, *if necessary*,” it lies upon the plaintiff to show the necessity of a shorter notice than the ordinary one (*Drake v. Pickford*, 1846, 15 Mee. & W. 607). In *Pretty v. Nauscauwen*, 1873, L. R. 9 Ex. 42, the Court (Kelly, C.B., Bramwell and Pollock, BB.) held that the rule laid down by Alderson, B., in *Drake v. Pickford* was correct. The term “if necessary” must be taken to mean “if the plaintiff, using reasonable diligence, cannot give full notice,” and was not to be construed solely with reference to the course of pleading.

Necessary or Proper Party.—See SERVICE OUT OF THE JURISDICTION.

Necessity.—The chief uses of this term in law are “homicide by necessity” (see HOMICIDE, vol. vi. at p. 217, and case of *R. v. Dudley*, 1884, 14 Q. B. D. 273) and “works of necessity” (see SUNDAY). See also ACT OF GOD; INEVITABLE ACCIDENT; WAR (*as to military necessity*).

Ne disturba pas.—See QUARE IMPEDIT.

Ne exeat regno.—A writ of *ne exeat regno* (or, as it was sometimes termed, *ne exeat regnum*) issues to prevent a person from leaving the realm without the leave of the Court.

Origin of Writ.—It was a high prerogative writ unknown to the common law. In its origin, the writ, though formerly not known by that name, but as a writ *de securitate inveniendâ quod se non divertat ad partes externas sine licentiâ regis*, was used for purposes of State. It has been asserted that it was in the earliest times framed to prevent the clergy from leaving the realm without the king's licence, and thus to put a check upon too strict an intercourse between the English ecclesiastics and the Papal See, and generally to prevent any person from going beyond the seas to transact anything to the prejudice of the king or his government. It is not easy to fix the time when the political writ *de securitate inveniendâ* took the name and form of the civil writ *ne exeat regno*, the object of which is to prevent a person from leaving the kingdom to the injury of his creditor. Lord Bacon states that “writs of *ne exeat regno* are properly to be granted, according to the suggestion of the writ, in respect of attempts prejudicial to the king and State (in which case the Lord Chancellor will grant them upon prayer of any of the principal Secretaries, without cause showing or upon such information as his Lordship shall think of weight); but otherwise also they may be granted according to the practice of long time used, in case of interlopers in trade, great bankrupts in whose estates many subjects are interested, or other cases that concern multitudes of the king's subjects, also in case of duels and divers others” (*Ordinances in Chancery*, No. 89, cited Beames on *Ne Exeat*, p. 19; Spedding, vol. vii. pp. 771, 772). See judgment of Lord

Eldon, L.C., in *Etches v. Lance*, 1802, 7 Ves. 416; and see *Anon.*, 1748, 1 Atk. 521; *Jackson v. Petrie*, 1804, 10 Ves. 163; 7 R. R. 368; *Bernal v. Marquis of Donegal*, 1805, 11 Ves. 43; *Boehm v. Wood*, 1823, Turn. & R. 343. As to the history and origin of the writ, the reader is referred to chap. i. of the work of Mr. Beames on the subject.

Present Limitations on Issue of Writ.—The writ can still be issued, but it is believed to be exceedingly rare in modern practice, and there are but few reported cases on the subject of recent years. It has been held that, under the present practice, the writ is not to be issued in cases where before the Judicature Acts the applicant's claim would not have been enforceable in the Court of Chancery (*Drover v. Beyer*, 1879, 13 Ch. D. 242). In the last-named case, and in *Hands v. Hands*, 1881, 43 L. T. 750, it was held by Jessel, M. R., that it could not issue except in cases within the provisions of sec. 6 of the Debtors Act, 1869 (32 & 33 Vict. c. 62). Under that section, the plaintiff in any action at law, in which, if brought before the commencement of the Act, the defendant would have been liable to arrest, may obtain an order for imprisonment of the defendant for a period not exceeding six months, until he has given security that he will not go out of England without leave of the Court. Such order is obtained on proof at any time before final judgment, by evidence on oath that the plaintiff has good cause of action against the defendant to the amount of £50 or upwards, and that there is probable cause for believing that the defendant is about to quit England, and that his absence will materially prejudice the plaintiff in the prosecution of his suit (see R. S. C. 1883, Order 69). In this absence of modern authority it is necessary to have regard to the earlier cases in considering the rules which governed, and which still (regard being had to the provisions of the Debtors Act, 1869) govern, the Court in exercising a jurisdiction of a very special and delicate character. So special indeed was the jurisdiction considered, that in one case it was stated that "the application of this high prerogative writ to these purposes can only be justified by usage and practice. If they will not warrant it under such circumstances, I do not know upon what it is to stand" (per Lord Eldon, L.C., *Etches v. Lance*, 1802, 7 Ves. 416). In *Dick v. Swinton*, 1813, 1 Ves. & Bea. 371, the same learned judge is reported to have said, "The writ is a most powerful instrument, and I never apply it without apprehension." And in another case it was said that the Court ought to feel no inclination to extend the application of this high prerogative writ (*Whitehouse v. Partridge*, 1818, 3 Swans. 365; 19 R. R. 216).

Writ issued only in Chancery.—The writ, then, was issued by Courts of equity. There were cases indeed in which the Court of Exchequer granted orders of a similar nature, applying them only to cases in which the Court of Chancery would apply the writ of *ne exeat regno* (*Bernal v. Marquis of Donegal*, 1805, 11 Ves. 43).

Nature of Writ, and when granted.—A writ of *ne exeat* was in the nature of equitable bail (*Haffey v. Haffey*, 1807, 14 Ves. 261; *Dick v. Swinton*, 1813, 1 Ves. & Bea. 171). It was only granted in the case of equitable claims. A party would not be held to bail in equity in any case in which he could be held to bail at law (*Pannell v. Taylor*, 1823, Turn. & R. 96; see *Anon.*, 1741, 2 Atk. 210; *Ex parte Bruncker*, 1734, 3 P. Wms. 311; *Pearne v. Lisle*, 1749, 1 Amb. 76; *Ex parte Duncombe*, 1774, 2 Dick. 503; *Atkinson v. Leonard*, 1791, 3 Bro. C. C. 218; *Whitehouse v. Partridge*, 1818, 3 Swans. 218; 19 R. R. 216; *Flack v. Holm*, 1820, 1 Jac. & W. 405; 21 R. R. 202; *Boehm v. Wood*, 1823, Turn. & R. p. 344).

Where, however, the Court of Chancery had a concurrent jurisdiction

with Courts of law, as in cases of account, the writ was allowed, even though bail might be had at law (*Jones v. Sampson*, 1803, 8 Ves. 593; *Jones v. Alephsin*, 1810, 16 Ves. 470; *Flack v. Holm*, 1820, 1 Jac. & W. 405; 21 R. R. 202; *Boehm v. Wood*, 1823, Turn. & R. p. 344). And in cases of alimony decreed by the spiritual Court, the writ was also allowed (*Anon.*, 1741, 2 Atk. 210; *Shaftoe v. Shaftoe*, 1802, 7 Ves. 170; *Dawson v. Dawson*, 1803, 7 Ves. 173).

The claim must have been one of a pecuniary character, and for a sum certain (*Anon.*, 1748, 1 Atk. 521; *Cock v. Ravie*, 1801, 6 Ves. 283; *Boehm v. Wood*, 1823, Turn. & R. 344), and payable *in presenti* (*Whitehouse v. Partridge*, 1818, 3 Swans. 365; *Boehm v. Wood*, 1823, Turn. & R. p. 344); and see the modern case of *Colverson v. Bloomfield*, 1885, 29 Ch. D. 341, where the writ was refused against a trustee who had been ordered to pay a sum of money into Court within seven days after service of an order, which had not been served. Where a person had been ordered to pay an admitted balance into Court by a certain day, the writ was ordered to issue although the day for payment had not arrived (*Sobey v. Sobey*, 1873, L. R. 15 Eq. 200).

A present vested interest, though capable of being divested, is a sufficient interest to support the writ (*Howkins v. Howkins*, 1860, 1 Drew. & Sm. 75). In a suit for specific performance the writ was refused, where a covenant in an agreement for a lease was broken, and a verdict obtained for damages for the breach, and, the plaintiff having died, the damages were lost at law (*Jenkins v. Parkinson*, 1833, 2 Myl. & K. 5). As to granting the writ in cases of specific performance generally, see *Boehm v. Wood*, 1823, Turn. & R. 332.

The Court would not grant the application for the writ unless the applicant was in a position to swear positively that the defendant was indebted in a certain sum (*Rico v. Gualtier*, 1747, 3 Atk. 500; *Thompson v. Smith*, 1865, 13 W. R. 422); though on a bill for an account it was sufficient if the plaintiff swore to a balance to the best of his belief (*Rico v. Gualtier*, *ubi supra*), but facts or declarations as to the grounds of such belief were required to be stated (*Amsinck v. Barklay*, 1803, 8 Ves. 594).

The writ was refused against a member of Parliament going to Ireland (*Bernal v. Marquis of Donegal*, 1805, 11 Ves. 43). It was allowed to prevent a defendant proceeding to Scotland (*Done's case*, 1714, 1 P. Wms. 262; and see *Mackintosh v. Ogilvie*, 1747, 1 Dick. 119). The writ was not granted to a plaintiff resident out of the jurisdiction (*Hyde v. Whitefield*, 1815, 19 Ves. 341; 13 R. R. 215; *Smith v. Nethersole*, 1832, Russ. & M. 450). The circumstance of the defendant being a foreigner was held to be no ground for discharging the writ, although by the law of his own country he was not subject to arrest upon unliquidated balances of account (*Flack v. Holm*, 1820, 1 Jac. & W. 405; 21 R. R. 202). The writ could be obtained by a defendant on an account against a co-defendant (*Done's case*, 1 P. Wms. 262; and see *Sobey v. Sobey*, 1873, L. R. 15 Eq. 200). It has been granted against a contributory in default under an order of the Master for a call without bill filed (*In re North of England Joint-Stock Banking Co.*, *Mawer's case*, 1851, 4 De G. & Sm. 349). The Court granted the writ against an attorney upon a sum found by the Master's report to have been overpaid him (*Lloyd v. Cardy*, 1701, Prec. in Ch. 171).

Application, how made.—The application for the writ is made by *ex parte* motion, and may be made at any time before final judgment. Under the practice of the Court of Chancery, it was not necessary that the writ should be prayed for in the bill (*Collinson v. —*, 1811, 18 Ves. 353;

11 R. R. 212). The application should be prompt (*Jackson v. Petrie*, 1804, 10 Ves. 163).

Evidence in support.—In support of the application, evidence is required as well of the debt as of the circumstances on which it arises, and of the fact of the defendant's intention to go abroad, or of his threats or declarations to that effect, or of any overt act from which such intention can be reasonably inferred (*Russell v. Ashby*, 1799, 5 Ves. 96; *Amsinck v. Barklay*, 1803, 8 Ves. 594). In accordance with the decision in *Drover v. Beyer*, 1879, 13 Ch. D. 242, to which allusion has been made *supra*, it must now be shown that the case is within sec. 6 of the Debtors Act, 1869, and that the absence of the defendant will materially prejudice the plaintiff in the prosecution of his action.

Evidence is usually given by affidavit. The affidavit as to debt was required to be positive, as positive indeed as an affidavit to hold to bail, evidence upon information and belief being admitted only in matters of account (*Roddam v. Hetherington*, 1799, 5 Ves. 91; *Jackson v. Petrie*, 1804, 10 Ves. 163; 7 R. R. 368; *Flack v. Holm*, 1820, 1 Jac. & W. 405; 21 R. R. 202; *Boehm v. Wood*, 1823, Turn. & R. p. 344). An admission, however, by the defendant would certainly do as well as an affidavit (per Lord Rosslyn L.C., *Roddam v. Hetherington*, 1799, 5 Ves. 91). The evidence that defendant intends to go abroad must also be positive in its character (*Etches v. Lance*, 1802, 7 Ves. 416; *Oldham v. Oldham*, 1802, 7 Ves. 409; *Jones v. Alephsin*, 1810, 16 Ves. 470). It is not necessary that the affidavit should be by the plaintiff himself, nor that it should be made by the party giving the information upon which the deponent founds his belief, if it comes from persons of the defendant's family (*Collinson v. —*, 1811, 18 Ves. 353; 11 R. R. 212). The affidavit was sufficient if it stated that the debt would be endangered, without stating that the defendant was going abroad to avoid the jurisdiction (*Etches v. Lance*, 1802, 7 Ves. 416; *Stewart v. Graham*, 1815, 19 Ves. 312).

Furnishing Copies of Affidavit.—In the case of an *ex parte* application for a writ of *ne exeat regno*, the party making such application must furnish copies of the affidavits upon which it is granted, upon payment of the proper charges, immediately upon the receipt of a written request and undertaking to pay such charges, or within such time as may be specified in such request, or may have been directed by the Court or a judge (Order 66, r. 7 (j)).

Form of Order.—The order directs the amount for which the writ is marked for security to be at length and not in figures. For form of order, see Seton, p. 449.

Undertaking in Damages.—The Court usually insists as a condition of granting the writ, that the applicant shall give an undertaking to be answerable for any damages which the Court may hereafter award in consequence of the issue of the writ.

Form of Writ.—The writ, addressed to the sheriff, recites the fact of defendant's indebtedness, and that he designs quickly to go into parts beyond the seas, to the prejudice of the plaintiff, and commands the sheriff to cause the defendant to give security in the sum mentioned in the order that he will not go abroad without leave of the Court; and in the event of refusal to give such bail or security, the sheriff is to commit the defendant to prison until security be given. For form of writ, see Daniell's *Forms*, p. 711.

Where the writ issues against an executor at the instance of a legatee, it must be marked for the whole amount due, not only to the plaintiff, but to

other parties interested (*Pannell v. Taylor*, 1823, Turn. & R. 96). If it issues for a larger sum than is due, the Court will order that so much only be raised as is really due, without quashing the writ (*ibid.*; *Grant v. Grant*, 1827, 3 Russ. 598; 27 R. R. 135).

Writ, how executed.—After caption by the sheriff, the defendant, in order to obtain his discharge, must execute a bond, with two sureties, to the sheriff, in double the sum marked on the writ, conditioned not to go or attempt to go into parts beyond the seas without leave of the Court (Turner's *Chancery Practice*, p. 990; Daniell's *Forms*, p. 711). What the sheriff does in a case of *ne exeat regno* is upon his own responsibility (*Boehm v. Wood*, 1823, Turn. & R. 340).

Discharge of Writ.—A writ of *ne exeat regno* may be discharged upon application made by motion, with notice to the party who obtained the order for the writ to issue. The writ will be discharged if it be shown to have been irregularly issued (*Hyde v. Whitfield*, 1815, 19 Ves. 341; 13 R. R. 215; *Flack v. Holm*, 1820, 1 Jac. & W. 405; 21 R. R. 202; *Sichel v. Raphael*, 1861, 4 L. T. 114). It will not be discharged upon an affidavit denying intention to go abroad (*Amsinck v. Barklay*, 1803, 8 Ves. 594). A writ was discharged where there was a strong *prima facie* case that nothing was due (*Leo v. Lambert*, 1827, 3 Russ. 417). It will be discharged if defendant brings into Court the sum for which the writ is marked (*Evans v. Evans*, 1790, 1 Ves. Jun. 95; *Stewart v. Graham*, 1815, 19 Ves. 312; *Dick v. Swinton*, 1813, 1 Ves. & Bea. 371).

Where a writ of *ne exeat* was obtained immediately after the commencement of the action, and defendant was arrested thereunder, but discharged on payment of the sum for which the writ was marked, but he took no steps to have the writ set aside, it was held that it must be taken to have been properly issued, and the Court refused to allow damages for the arrest (*Lees v. Patterson*, 1878, 7 Ch. D. 866). Where the Court is of opinion that the writ has been improperly obtained, an inquiry as to damages will be directed under the undertaking required from the party on application for the writ (*Sichel v. Raphael*, 1861, 4 L. T. 114; for form of order, see Seton, p. 450).

[*Authorities.*—Beames' *Brief View of the Writ of Ne Exeat*, 2nd ed., 1824; Comyn's *Digest*, 5th ed., 1822, tit. "Chancery," 4 B.; Daniell's *Chancery Practice*, 6th ed., 1884, ch. xxvii.; Daniell's *Chancery Forms*, 4th ed., 1885, ch. xxvii.; Seton's *Judgments and Orders*, 5th ed., 1891, ch. xxx.; Sidney Smith's *Chancery Practice*, 7th ed., 1862, pp. 840–844; Story's *Equity Jurisprudence*, 2nd English ed., 1892, pp. 1003–1008; Turner's *Chancery Practice*, 6th ed., 1825, pp. 984–992.]

Negative.—See BURDEN OF PROOF; PLEADING; PRESUMPTIONS.

Negative Pregnant.—"A negative pregnant is such a form of negative expression as may imply or carry within it an affirmative proposition" (Odgers, *Pleading*, 3rd ed., p. 142). See, as an illustration, *Myn v. Coles*, Jac. I. Cro. (3) 87, where, in an action of trespass, the plaintiff replied, to a plea by the defendant that the plaintiff's daughter gave him licence, that the defendant did not commit the act complained of *by her licence*; held that the plaintiff should have traversed the trespass by itself or the licence by itself, and not both together. See R. S. C. Order 19, rr. 17–19.

Negligence.

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NEGLECT.

Definition.—Negligence in law signifies a coming short of the performance of duty.

Notions of Duty and Right.—Duty is the obligation binding members of the community so to act as not to infringe the rights of other members of the community. Each member of the community has a right to the enjoyment of personal security, personal liberty, and personal property, so far as enjoyment of them is not limited by considerations of the general good; and, besides, to those civil privileges which the existence of society secures.

Standard of Duty.—As civil society becomes more complex, greater inroads are made upon the rights of individuals, and the duties exacted from its members are increased both in number and minuteness. Failure to attain the standard of duty, that is to say negligence, is a relative notion dependent on the idea of duty which is adopted for the time being and in the circumstances.

Duty implies Intelligent Agency.—As manners change or develop, and the mechanical appliances in daily use improve in construction, and the customary methods of using them indicate the attainment of a greater skill in the workman, the standard of duty advances in like proportion; so that always there is required by law from one acting so as to interfere with another, such an amount of care and caution as an average, prudent, and intelligent man dealing in his own concerns would exert. If the matter is one where special skill is professed—a matter not of general duty, but of private arrangement—the skill shown must be that of the ordinary and average skilled person; but in general, the rule of duty is one suited to the average standard of intelligence and care amongst ordinary people.

Till a duty is shown to exist from the person alleged to be in default towards the person damnified, there can be no negligence. In determining whether a duty does exist, certain leading principles may be taken as guides.

Negligence Actionable, as it violates the General Duty not to interfere with Rights of Others.—It is obvious that the existence of society necessitates the observance by man to man of defined rules of conduct, the breach of which must be attended with liability; while there can be no adequate liability which is not based upon an intelligent, responsible perception. No one is liable in respect of damage wrought by a convulsion of nature (per Cockburn, C.J., *Nugent v. Smith*, 1876, 1 C. P. D. 423, at 435); nor “if a man by force take my hand and strike you,” am I liable (*Weaver v. Ward*, 14 Jac. 1., Hob. 134). At the root of the legal notion of duty is the power not merely to distinguish and will, but to act. Again, given the intelligent agency, there must be a subject-matter with reference to which it must act or forbear. And this is found in the whole body of the civil rights of others. “Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad, or indifferent” (per Lord Watson, *Allen v. Flood*, [1898] App. Cas. 1, at 92). Where, then, there is the right of another not to be interfered with, there arises a duty not to interfere; and any interference is default in duty, which may be treated as negligence in so far as the interference can be viewed as a failure to attain the standard of legal duty.

Whether the natural right to act has been restrained, is a question to be decided by positive law. The restraint imposed is a duty. The right of an individual to be free from interference does not impose a duty on those around him actively to intercept for his benefit any train of consequences already in motion, it merely points their duty not voluntarily to give any new direction to action which, unchecked, may be injurious to him (*Scott v. Shepherd*, 1704, 1 Sm. L. C., 10th ed., 438); nor does it so much as require that a man should scrutinise every agency he sets in motion, with a view to secure perfect immunity for all those who may come in the sphere of the forces he has set in motion. “The ordinary business of life could not go on if we had not a right to rely upon things being properly done when we have committed and intrusted them to persons whose duty it is to do things of that nature, and who are selected for the purpose with prudence and care, as being experienced in the matter, and are held responsible for the execution of the work” (per Lord Westbury, *Daniel v. Metropolitan Rwy. Co.*, 1870, L. R. 5 H. L. 45, at 61). But it does require that, “if one man is near to another, or is near to the property of another” (*Le Lievre v. Gould*, [1893] 1 Q. B. 491, at 497), he should regard the probability of any act of his interfering with that other; and if it does interfere, after this duty to be careful so as not to interfere has been raised, he violates a duty towards that other.

Besides the general duty not to interfere with the rights of others, each person may, within certain limits, so regulate his conduct by agreement with others as to create special duties to them. These duties are dependent upon the terms of the contracts entered into.

Law provides for Ordinary and Average Events, not for Extraordinary Occurrences.—In providing against interference with the rights of others, it is not every development of consequence that must be foreseen. “The law provides for that which is common, not for that which is unusual”

(per Parke, B., *Hawtayne v. Bourne*, 1841, 7 Mee. & W. 595, at 598; cp. *Gwilliam v. Twist*, [1896] 2 Q. B. 84); and if the consequences of any act prove other than those which an average prudent man might reasonably foresee, if his attention were called to the situation, the act is not turned into a breach of duty merely because its result is an injurious consequence which, if foreseen, should have been refrained from (*Blyth v. Birmingham Water Works Co.*, 1856, 11 Ex. Rep. 781). The quality of the act is determined by the consideration whether an average prudent man, by considering the situation apart from the result, might be expected to foresee an injurious result from the action. If he would, there is a duty to refrain from acting. If he would not, even though damage accrue to another, he is under no duty. But if, in the face of a duty to refrain, a man persists in acting, and damage flows from his action, even though the consequences are abnormal and such that no reasonable man antecedently could anticipate, he is liable for all the consequences so long as they flow in uninterrupted sequence from the original default (*Smith v. London and South-Western Ry. Co.*, 1870, L. R. 6 C. P. 14). The distinction is this: in the one case the act does not denote a failure of duty; it is lawful, and none the less so because other things induce a damage which is not due to its original nature; in the other case, what was done was in its origin a breach of duty, and the wrong-doer cannot qualify the consequences of his default at the expense of others.

Notion of Fault at the root of Legal Conception of Duty.—This notion of fault is as essential to the conception of negligence as is the notion of duty. In fact, it is merely another aspect of it. Where there is fault, there must be a duty; and duty unperformed implies fault. The only case of exception to this is where what else would be fault, and what is fault *prima facie*, is yet excused because what is done is done by compulsion or without capacity of intelligent assent (*Weaver v. Ward*, 14 Jac. I. Hob. 134).

Res ipsa loquitur.—Where the duty is so plain as to admit of no denial, the presumption that failure in performance indicates fault, is expressed by the maxim *Res ipsa loquitur*. The damage tells its own story: (1) where the agency producing it should be under the control of any person indicated (*Byrne v. Boadle*, 1863, 2 H. & C. 733); (2) where an accident happens in doing anything which experience suggests does not ordinarily happen where proper precautions are observed (*Watson v. Weekes*, cited *Tolhansen v. Davies*, 1888, 57 L. J. Q. B. 392, at 394). The inference may be shown to be incorrect, but, till it is, mere proof of the damage suggests both the duty and fault in not attaining to the standard of it.

Culpa tenet suos auctores tantum.—Perhaps the widest generalisation to be found amongst principles of law bearing on negligence is that which designates those responsible for fault, *Culpa tenet suos auctores tantum*. A man is liable for the consequences of his conduct, if he is in fault and he alone is liable. If he is not in fault, loss lies where it falls. Where duty and fault coexist, liability for negligence attaches to the *auctores*, whether they are such in fact or only by construction of law.

RULE OF PERSONAL LIABILITY.

In most cases, at any rate, a man is under no obligation to act; if, notwithstanding, he chooses to act, he must take the consequences of his choice. If his act injures another person, he must indemnify that other from the consequences which his exercise of choice and action have produced (see per Rede, J., *Y. B.*, 21 Hen. VII. pl. 5, at 28 a, cited *Leame v. Bray*, 3 East, 593). If the action is constrained and the

person acting altogether blameless in the production of the circumstances which compel action, there is no liability, for there is no fault (*Com. Dig.*, 5th ed., "Battery" (A), note *d*; *Holmes v. Mather*, 1875, L. R. 10 Ex. 261). Again, action may be in itself indifferent, but may take its colour from the circumstances. To drive fast on Salisbury Plain with no one in sight is what any prudent man might reasonably do, and if an accident happens through driving over a man, who was lying concealed there, there is no liability, for there is no fault. To drive as fast down Cheapside at midday as is allowable on Salisbury Plain with no one in sight, is an act, even if possible, blameworthy; and in the event of a collision, is an act which presumes fault (*Le Lievre v. Gould*, [1893] 1 Q. B. 491). Yet even here the existence of fault may be negatived, and with it responsibility; as by showing that the fast driving and the collision were due to the incalculable impulse of a restless horse, and that there was no fault (*Hammack v. White*, 1862, 11 C. B. N. S. 588; *Manzoni v. Douglas*, 1880, 6 Q. B. D. 145). Unavoidable accident is on the same ground never actionable (*Wakeman v. Robinson*, 1823, 1 Bing. 213; 25 R. R. 618).

It has been noted that an act is not wrongful merely because in its consequences damage results to others, if those consequences were not the ordinary and natural results to be anticipated from the act; so, too, where damage has resulted to anyone which is traceable to an act not in ordinary circumstances done by the person from or upon whose property the damage has come, fault will not *prima facie* be imputed to him; for experience teaches that the class of acts to which the act causing damage is referred are not ordinarily done by the property owner, or by those for whose lapses from duty he is responsible (*Welfare v. London, Brighton, and South Coast Rwy. Co.*, 1869, L. R. 4 Q. B. 693; cp. *Kearney v. London, Brighton, and South Coast Rwy. Co.*, 1870, L. R. 5 Q. B. 411, in Ex. Ch. L. R. 6 Q. B. 759). If the class of acts were ordinarily done by them, the occurrence of damage arising from an act of the class would impute liability.

Respondeat superior.—To the rule that it is only the doer of the act complained of who is legally answerable for the consequences of it, there is a gloss which immensely extends the meaning of the words *suos auctores*. *Auctores* are not merely those who do, but those who, whether expressly or tacitly, authorise the doing of anything. The legal principle applicable is summed up in the words *respondeat superior* (13 Edw. I. c. 11, 2 *Co. Inst.* 379), which points the maxim of law, *Qui per alium facit, per se ipsum facere videtur* (*Co. Litt.* 258 a). Our liability for our acts is not limited to those we do with our own hands, but extends to those we do by using the hands of others, so far as those others do not go beyond the sphere prescribed for their action—so far as they act within the scope of the authority given to them (*Smith v. Keal*, 1882, 9 Q. B. D. 340, per Jessel, M. R., at 351); and this extends to cover all acts done in the course of the service and for the master's benefit, not only though no privity of the master be proved (*Mackay v. Commercial Bank of New Brunswick*, 1874, L. R. 5 P. C. 394), but even in the face of a distinct prohibition, if the act is one of the class of acts ordinarily done by servants acting in their employment (*Limpus v. London General Omnibus Co.*, 1862, 1 H. & C. 526). But this liability only exists in the case of acts done for us which, if not done with the hands of others, would be done with our own. It does not extend to work done for us in which we are only concerned in the result as distinguished from the means of effecting it, with the exceptions to be noticed in a moment.

Master and Servant.—Duty of Master.—Where the relationship between two people is not that of master and servant, there is no derivative liability—the shortcomings of the one in attaining the standard of duty cannot be cast, by the person whose rights are infringed, upon the other (*Whitfield v. Lord Le De Spencer*, 1778, 2 Cowp. 754). The most common illustration of this is perhaps the case of proceedings against the managing body of a hospital or such institution, for alleged defaults of the medical men on their staff. The managing body are not liable, because the medical men they employ are not their servants; they may indeed dismiss them, but they cannot prescribe the course of treatment to be adopted towards the patients. Save in the case of appointing a notoriously incompetent man, they are not in fault; so there is no liability (*McDonald v. Massachusetts General Hospital*, 21 Amer. R. 529). The operation of this principle is not confined merely to the case of medical men, but avails generally (*Foreman v. Mayor, etc., of Canterbury*, 1871, L. R. 6 Q. B. 214; *Crisp v. Thomas*, 1891, 63 L. T. 756).

But the employer continues liable,—

1. Where a contractor is employed on work which cannot legally be done by the employer (*Ellis v. Sheffield Gas Co.*, 1853, 2 El. & Bl. 767).

2. Where injury arises to some third person from doing the very thing delegated to be done (*Pickard v. Smith*, 1861, 1 C. B. N. S. 470).

3. Where there is a statutory obligation to do the thing the doing of which by another is complained of (*Gray v. Pullen*, 1864, 5 B. & S. 970).

4. Where the thing done is necessarily dangerous to be done (*Hughes v. Percival*, 1883, 8 App. Cas. 443).

The principle does not apply in the cases above enumerated, because in each there is a general duty of the employer to the world at large, and this cannot be shifted by agreement between other than those to whom the duty is owing.

Disabilities of Servant.—For all the ordinary risks of an employment which a master engages his servant upon, the master comes under no liability to the servant (*Priestley v. Fowler*, 1837, 3 Mee. & W. 1). This is for two reasons: (1) if an accident occurs, the master not being present on the work, there is no fault of the master occasioning the accident; and where there is no fault there is no liability; while (2) the risk which the servant has to encounter is an element of his employment; it is the concomitant of the very thing he is engaged to do; it is considered in his wages.

In working out this principle, it must be borne in mind that all those are servants who form part of the organism set in motion by the employer in bringing about the common result of the work (*Wilson v. Merry*, 1868, L. R. 1 Sc. App. 326), even although the employer is a corporation and the servant is a manager appointed under the provisions of an Act of Parliament (*Howells v. Landore Siemens Steel Co. Ltd.*, 1874, L. R. 10 Q. B. 62).

The liability of the master does not exonerate the servant. He has been guilty of a breach of duty, and the fact that the law imputes his default to his employer does not free him from liability (*Stone v. Cartwright*, 1795, 6 T. R. 411; 3 R. R. 220).

When the rule of duty that governs between master and servant comes to be considered more generally, it is by no means identical with the rule of duty owing by either master or servant to the world at large. The explanation is that the contractual element enters in, and brings to bear its special principles whenever the relation of master and servant is constituted; yet the relation of master and servant is so nearly universal,

that what in fact were originally merely consequences deduced, perhaps artificially, from the application of the ordinary rules of law governing contracts, come commonly to be looked at as elementary principles of general application; while the course of recent legislation tends distinctly to regard the relation of master and servant as an outcome of the general duties of the citizen, and not as matter for private partiality or arrangement. The master's personal duty to his servant is, however, identical with his duty to the world at large. He must use all due care to avoid infringing any of the servant's rights. If the master injures the servant, he must compensate him for the injury as in any other case (*Ashworth v. Stanwick*, 1860, 3 El. & El. 701). Besides, he must use all reasonable and ordinary precautions to safeguard his servant from dangerous conditions of his property, machinery, or tools (*Paterson v. Wallace*, 1854, 1 Macq. H. L. Sc. 748; *Brydon v. Stewart*, 2 Macq. H. L. Sc. 30); to secure that the scheme of work on which the servant is employed is not, considering all the circumstances, unnecessarily hazardous (*Smith v. Baker*, [1891] App. Cas. 325); and to provide him with competent fellow-servants (*Tarrant v. Webb*, 1856, 18 C. B. 797, at 804; *Potts v. Port Carlisle Dock and Rwy. Co.*, 1861, 8 W. R. 524). There is, however, no disability on the master to engage the servant on dangerous work (*Holmes v. Worthington*, 2 F. & F. 533, per Willes, J., at 534), provided the servant has equal means of knowledge of the danger as his master (*Griffiths v. London and St. Katherine Dock Co.*, 1884, 13 Q. B. D. 259). Where the danger to be encountered by the servant is plain at the time of entering on the employment, the law presumes that the servant agreed to take the risk of the danger, even though in fact the servant knew nothing about it (see per Lord Esher, *M. R., Yarmouth v. France*, 1887, 19 Q. B. D. 647, at 653). Where the risk arises subsequently, the master has to show that the servant has either expressly or by inference accepted the increased risk as incident to his employment (*Smith v. Baker*, [1891] App. Cas. 325). But where the risk is brought about by the ignoring some requirement of the statute law, to exonerate the master from his breach of duty to his servant clear proof must be given of the workman's acceptance of the work in its hazardous state, with full knowledge of the master's statutory duty to him in the matter (*Thomas v. Quartermaine*, 1887, 18 Q. B. D. 685). The maxim of the law is *Volenti non fit injuria*. (The significance of this is fully discussed in *Membery v. Great Western Rwy. Co.*, 1889, 14 App. Cas. 179; *Smith v. Baker*, [1891] App. Cas. 325; and *Thomas v. Quartermaine*, *supra*).

Special Rule in Case of Young Children.—At common law there does not appear to be any direct disability on the employment of young children, even in the most dangerous occupations. The rule of law, that when anyone is employed on work he is presumed to undertake only such risks of the employment as are ordinarily apparent to a person in his position and circumstances, is, however, their sufficient protection (see *Bartonshill Coal Co. v. McGuire*, 1883, 3 Macq. H. L. Sc. 266, per Lord Chelmsford, at 311, and per Lord Cranworth, at 294; *Gemmell v. Gourock Rope Work Co.*, 23 Dunlop, 425; *Grizzle v. Frost*, 1863, 3 F. & F. 622).

If persons employ young children in dangerous surroundings, they must take care commensurate with the youth and inexperience of the children and the danger and difficulty of the work, in safeguarding them. In the United States the rule has been even more widely stated. Where a father put his son to an employment in which the son was injured, the Supreme Court of the United States held that the father had the right to presume, when he made the contract of service, that his son

would not be exposed to the peril of dangerous work. "Not being able to judge for himself, he had a right to rely on the judgment of the foreman" (*Union Pacific Railroad Co. v. Fort*, 17 Wall. (U. S.) 553).

The principle seems a sound one, though not yet asserted in any English decision. Recently cases raising the point have been brought in the English Courts, but have been compromised. The age within which this principle of special care to young people may be asserted is very indeterminate. In *Crocker v. Banks* (1887, 4 T. L. R. 324), the Court of Appeal applied the principle where the plaintiff was a girl of seventeen, and described as an "expert hand" at her business.

RULE OF LIABILITY WITH RESPECT TO PROPERTY.

With regard to the possession of property, the most extensive rule of duty is, *Sic utere tuo ut alienum non lædas* (9 Co. Rep. 59). The person who for his own purposes brings on his land, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not keep it in, he is *prima facie* answerable for all the damage which is the natural consequence of its escape (see per Lord Cairns, C., in *Rylands v. Fletcher*, 1868, L. R. 3 H. L. 330, at 339).

If a man acts for his own convenience, he must keep the consequences of his act to himself; if he does not, he is infringing upon the equal rights of his neighbour; he is in fault in not attaining the standard of duty, and must indemnify his neighbour for his default. The absoluteness of this principle is limited, in the common interest, by requiring from persons living in societies submission "to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours"; but this does not extend "to circumstances the immediate result of which is sensible injury to the value of the property" (*St. Helens Smelting Co. Ltd. v. Tipping*, 1867, 35 L. J. Q. B. 66).

If a man plants poisonous trees on his land so that they overgrow upon his neighbour's, and his neighbour's beasts are poisoned thereby, he is liable; for he has a duty to his neighbour to confine things hurtful to his neighbour to his own land, and if he does not do this, he has fallen short of his duty to his neighbour; he has been negligent (*Crowhurst v. Amersham Burial Board*, 1878, 4 Ex. D. 5). But if the poisonous leaves do not extend to his neighbour's boundary, he is not liable; for his legal duty to his neighbour stops with his boundary, within which he is free to do or grow whatever he wishes, so long as the boundary is not overpassed (*Ponting v. Noakes*, [1894] 2 Q. B. 281). So soon as it is, his duty to his neighbour arises once more. This is shown by considering the duty to fence at common law. An owner of land is under no obligation to fence for the benefit of his neighbour; but he is bound to see that his cattle do not stray out of his land into his neighbour's (*Churchill v. Evans*, 1809, 1 Taun. 529; 9 R. R. 600).

If, on the other hand, a man leaves his field uncultivated, and it becomes covered with thistles, and thistle seeds carried by the wind alight on his neighbour's land, take root and do damage, he has violated no duty to his neighbour; for the thistles are the natural growth of the soil; and legal duty most usually consists in refraining from interfering with a neighbour, and does not extend to taking independent action to avoid injuring him (*Giles v. Walker*, 1890, 24 Q. B. D. 656).

A man's general duty to his neighbour is to *forbear* from infringing upon that neighbour's right. The cases in which there is a positive obligation to act in accordance with a general duty are very rare. Lord

Campbell, C.J., indeed says, in *R. v. Lowe* (3 Car. & Kir. 123), that "a man may by a neglect of duty render himself liable to be convicted of manslaughter, or even of murder"; but he was considering the case where there is a duty to act; a duty which may arise either from undertaking a duty, or, more rarely, by the direct statutory imposition of one, as by 31 & 32 Vict. c. 122, s. 37, where a legal duty enforceable with a penal sanction is imposed on parents to provide adequate food, clothing, medical aid, or lodging for their children under a stated age. In most cases where a liability arises from not acting, the ground of the liability is a special and not a general duty, and is evidenced by a contract. Where this is the basis of the duty, the distinction between misfeasance and nonfeasance has no place (*Boorman v. Brown*, 3 Q. B. 511, per Tindal, C. J., at 525.) If, however, an injury is done by the wrongful act of one to the property of another, the wrong-doer is liable for breach of his general duty, which is quite apart from the existence of any contract between the owner and any third person, or between the third person and the wrong-doer. "A. lets B. a horse; B. with C.'s licence puts up at C.'s stables for reward to C. from B.; C. turns into the stables, loose, a vicious horse, known to be so, not to injure A.'s horse, but not thinking of the matter; there cannot be a doubt that C. would be liable to A. if the horse was injured. So, if he gave the horse bad oats which injured the horse, he would be liable, though he would not be to A. if he omitted to feed him" (per Bramwell, L.J., in *Harper v. Culliford*, 1878, 4 C. P. D. 182, at 185; cp. *Meux v. Great Eastern Rwy. Co.*, [1895] 2 Q. B. 387).

Where there is no general duty—no duty, that is, binding on a man by virtue of his position as a citizen, without any special undertaking on his part—and one so placed undertakes something for some other person, to which he is not bound unless he chooses to undertake it, the principle of law is that if he miscarries in the performance of it, he is liable for his default; though nobody could have compelled him to do the thing independently of his undertaking (per Holt, C.J., *Coggs v. Bernard*, 1 Sm. L. C., 10th ed., 167, at 181).

Under the maxim of law which we are now considering,—*Sic utere tuo ut alienum non lædas*,—the occupier of property cannot escape liability by employing another to discharge the duty which the law looks to him to perform (*Pickard v. Smith*, 1861, 10 C. B. N. S. 470; *Hole v. Sittingbourne and Sheerness Rwy. Co.*, 1860, 6 H. & N. 488). And if upon his property there is something which, in the ordinary course of time and from the natural progress of decay, is likely to deteriorate, the occupier's duty towards the world at large is to see that this is kept in a safe state of repair, and decay prevented (*Tarry v. Ashton*, 1876, 1 Q. B. D. 314). There is, however, one exception to the generality of this last principle. "If A. gives B. permission to cross his yard, in which there are several ways, and there is a pit in the yard which is usually covered, but on a particular night, it being uncovered, B. falls into it, I can understand that A. would be liable. But if the hole has always been uncovered, and B. in broad day walks into it, would A. be liable?" (per Wilde, B., in *Bolch v. Smith*, 1861, 7 H. & N. 736, at 742). The answer is given by Cockburn, C.J., in *Gallagher v. Humphrey*, 1862, 6 L. T. N. S. 684: "A person who merely gives permission to pass and repass along his close is not bound to do more than allow the enjoyment of such permissive right under the circumstances in which the way exists. . . . The grantee must use the permission as the thing exists. It is a different question, however, where negligence on the part of the person granting the permission is superadded.

It cannot be that, having granted permission to use a way subject to existing dangers, he is to be allowed to do any further act to endanger the safety of the person using the way" (*Gautret v. Egerton*, 1866, L. R. 2 C. P. 371; *Burchell v. Hickisson*, 1880, 50 L. J. Q. B. 101; *Ivay v. Hedges*, 1881, 9 Q. B. D. 80; and *Batchelor v. Fortescue*, 1883, 11 Q. B. D. 474, a case the reasoning of which is not to be extended). Growing out of, or perhaps another aspect of, the same principle is the rule which disentitles the members of a household, or the visitors received by them, to require any special precaution to be adopted by the occupier for their benefit; provided only that *if the occupier knows of any concealed danger, he is bound to give notice of it to his household and visitors* (*Southcote v. Stanley*, 1856, 1 H. & N. 247; *Collis v. Selden*, 1868, L. R. 3 C. P. 495). But where a person comes upon premises to do business with the occupier, he is entitled to rely on the care of the occupier to provide that his premises are reasonably safe, well lighted and guarded, and that if there is any peculiarity of arrangement or construction, he has full notice of such peculiarity given him (*Indermaur v. Dames*, 1866, L. R. 2 C. P. 311; *Smith v. London and St. Katharine Docks Co.*, 1868, L. R. 3 C. P. 326).

The occupier of property may moreover choose to keep *animals* on his land. The law of England recognises two classes of these: those that are of a dangerous character, which he must keep at his peril; and those not of a dangerous nature, which he may keep without being liable for the damage they may do, unless he knows that they have some vicious propensity (*Filburn v. People's Palace and Aquarium Company*, 1890, 25 Q. B. D. 258, per Lord Esher, M. R., at 261). If a tame animal acts *contra naturam suam*, its owner is not liable unless he have knowledge of its vicious propensity (see per Lord Chancellor Cranworth, *Fleming v. Orr*, 2 Macq. (H. L. Sc.) 14, at 23). There is also a third class of *indigenous animals* for which, whether dangerous or not, the occupier is not responsible. The principle of this is that which has been indicated above—the common law does not recognise a duty of intervention to correct injurious agencies for the benefit of another; it stops at requiring that one should so manage one's affairs as not to set in motion any agency injurious to another (*Boulston's case*, 5 Co. Rep. 104 b; *Farrer v. Nelson*, 1885, 15 Q. B. D. 258).

The principle *Sic utere tuo ut alienum non lædas* needs to be limited in some cases. "*Traffic on the highways*," for example, "whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger" (per Blackburn, J., in *Fletcher v. Rylands*, 1866, L. R. 1 Ex. 265, at 286; see, too, *River Wear Commissioners v. Adamson*, 1877, 2 App. Cas. 743, at 767). This apparent exception is, however, in entire harmony with the principle determining rights—that each man is entitled to the enjoyment of his capacities, and freedom to use them, up to the point that they infringe on the equal enjoyment of others. So soon as negligence is shown to have occurred and injury results, there is a breach of duty, and a claim for compensation arises. Indeed, the claim for immunity in respect of an accident happening on the highway can be put no higher than that the presumption expressed in the maxim *Res ipsa loquitur* is not raised in such a case. Negligence must be proved to have caused the accident in such circumstances: the accident does not presume the negligence. The latest authorities go to show that the measure of precaution here is not only against conduct leading to a negligent consequence, but against con-

duct which, considering the ordinary habits and mischievous proclivities of any class of people who may be brought into connection with it, may probably be turned to mischief. "If," said Tindal, C.J. (*Illidge v. Goodwin*, 1831, 5 Car. & P. 190, "a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done." The injury in that case was caused by the wilful, wanton act of a passer-by striking a horse. In *Engelhart v. Farrant* ([1897] 1 Q. B. 240), the Court of Appeal recognised this decision, and seemed to prescribe a rule of duty to guard against conduct which may be turned into a cause of mischief. Lord Esher, M. R., described such conduct as "an effective cause" of injury, produced by an intervening wrongful act.

CRIMINAL NEGLIGENCE.

Besides the duties owing from persons to persons, there is also to be considered the duty owing from citizens to the State.

Sir James Stephen (*General View of the Criminal Law of England*, 2nd ed., 76) says, "The word (negligence) is used in criminal law principally in reference to the infliction of bodily injury by neglecting to perform one of the duties which are by law imposed on various persons for the preservation of human life." In criminal negligence there is no element involved which is not to be found in ordinary civil negligence. The difference is primarily one of degree. "The amount of negligence that would make a man so responsible (criminally) cannot be defined. It is not a little failure in duty that would make him criminally responsible; a great failure of duty undoubtedly would" (per Blackburn, J., in *R. v. Eyre*, Finlason's *Report*, 57). This refers to criminal negligence at common law. In connection with criminal negligence, there is also the incident that the State has selected certain of those duties imposed on one person towards another for the preservation of human life and limb, and has made the obligation an obligation to the State, and not merely one enforceable by the person injured. Thus the State exacts reparation for any negligent default which may be made the subject of indictment. The most familiar illustration of this is culpable homicide. But in addition to these, there are various duties to which the State attributes more than ordinary importance, making them the subject of special statutory protection, with a criminal liability attaching to the non-observance of them. In these cases, whether negligence is criminal or not, depends on the nature of the duty unperformed, and not on the consequences of its non-performance. The instances of this species of legislation are numerous, and the tendency is yearly to extend the province of it. So long ago as 15 Rich. II., the neglecting to attend justices going to arrest persons making forcibly entry was made a criminal offence; and instances occur not infrequently of similar criminal legislation, till the present reign, when they become constantly recurrent. Thus furious driving (24 & 25 Vict. c. 100, s. 35); neglect by railway servants, whereby lives of persons may be endangered (3 & 4 Vict. c. 97, ss. 13, 14); doing anything by "wilful neglect, endangering the safety of railway passengers" (24 & 25 Vict. c. 100, ss. 32-34); neglect to provide servants and apprentices with necessaries (24 & 25 Vict. c. 100, s. 26; 38 & 39 Vict. c. 86, s. 6); neglect to procure vaccination (30 & 31 Vict. c. 84, s. 31); neglect of children by those having the custody of them (57 & 58 Vict. c. 41, s. 1); neglect by parent to cause child to attend school (41 Vict. c. 16, s. 84); neglect to fence machinery in factories (41 Vict. c. 16, s. 5; 54 & 55 Vict. c. 75, ss. 6, 37; and 58 & 59 Vict. c. 37); neglect to give notice of accident causing injury in certain employments (57 & 58

Vict. c. 28); neglect to fence chaff-cutting machines (60 & 61 Vict. c. 60); and many more breaches of duty of a similar kind are now matters which the State punishes by criminal process.

All the instances above given imply that the person guilty of default has placed himself in a position where he may be called on to act, but has failed to attain the standard prescribed for action. The point suggests itself whether a man may be criminally convicted who has merely abstained from acting. A public officer is indictable for default (*R. v. Wyatt*, 1704, 1 Salk. 380; *R. v. Hall*, [1891] 1 Q. B. 747), even if he does nothing; but this is manifestly because by undertaking the office he binds himself to perform the duties of it. A private person, *apart from any special statutory obligation*, is not compellable by law to perform even the most elementary duties of humanity which fall in the way of his daily pursuits, *e.g.* to rescue a man from drowning, or to pull a child from beneath the hoofs of a horse. The duty is in such case purely a moral one; and "moral predilections must not be allowed to influence our minds in settling legal distinctions" (Holmes, *The Common Law*, 148). Law, it may be broadly said, concerns itself chiefly with preventing interferences with other people's rights. Its aim (till recently) has been to protect the freedom between one another of individuals, and not to prescribe any description of action in aid of another. The master is not in general criminally liable for the act of his servant (*Woodgate v. Knatchbull*, 1787, 2 T. R. 148; 1 R. R. 449); unless the master co-operates with the servant in a criminal act, then he becomes an accessory; or the act of the servant is, from its very nature, obviously the act of the master (*Roberts v. Woodward*, 1890, 25 Q. B. D. 412; *Hardcastle v. Bielby*, [1892] 1 Q. B. 709; or the liability is imposed by statute, either directly or by means of a power to make by-laws (*Collman v. Mills*, [1897] 1 Q. B. 396; *R. v. Dixon*, 1814, 3 M. & S. 11; 15 R. R. 381; *A.-G. v. Siddon*, 1830, 1 Tyrw. 41).

STATUTORY DUTIES GENERALLY.

A statutory duty imposed by the State for its own ends *does not of necessity give rise to a duty to any person injured by its violation*. The general rule is that whenever a man has a temporal loss or damage by the wrong of another, he may have an action on the case to be repaired in damages (Com. Dig. tit. "Action on the Case" (A). The Statute of Westminster, 2 (13 Edw. I. c. 50), gives a remedy by action on the case to all who are aggrieved by the neglect of any duty created by statute (2 *Inst.* 486); and in Com. Dig. tit. "Action upon Statute" (F), it is laid down that "in every case where a statute enacts or prohibits a thing *for the benefit of a person*, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law."

It does not, therefore, follow that because the provisions of a statute enure to the benefit of a person that he is aggrieved by neglect of the duty, unless the object of the statute is to secure him that benefit; and Lord Cairns, C. (in *Atkinson v. Newcastle and Gateshead Waterworks*, 1877, 2 Ex. D. 441, at 447), doubted the proposition that "wherever a statutory duty is created, any person who can show that he has sustained injuries from the non-performance of that duty, can bring an action for damages against the person on whom the duty is imposed." Lord Cairns's doubt was shared by Lord Herschell (in *Cowley v. Newmarket Local Board*, [1892] App. Cas. 345, at 352), who agreed with Lord Cairns's opinion that much must "depend on the purview of the Legislature in the particular statute, and the language

which they have there employed"; and in *Clegg, Parkinson, & Co. v. Earby Gas Co.* ([1896] 1 Q. B. 592), the principle was enunciated that "where there is an obligation created by statute to do something for the benefit of the public generally, or of such a large body of persons that they can only be dealt with practically *en masse*, as it were, and where the failure to comply with the statutory obligation is liable to affect all such persons in the like manner, though not necessarily in the same degree, there is no separate right of action to every person injured by breach of the obligation in no other manner than the rest of the public."

A corporate body is in many cases called into existence for the purpose of discharging functions of local administration. The liability of such a body is governed by the statute which creates it. The powers conferred must be executed with due care; and, *primâ facie*, the duties and liabilities are the same as those imposed by the general law on private persons performing similar duties; but no action lies for mere non-feasance, unless there has been some duty neglected which has been imposed by the statute which creates it (*Mersey Docks v. Gibbs*, 1866, L. R. 1 H. L. 93; *Sanitary Commissioners of Gibraltar v. Orfila*, 1889, 15 App. Cas. 400). Thus what appears something of an anomaly in our law of liability for want of repair of a highway may be explained.

Rule in Russell v. Men of Devon.—In *Russell v. Men of Devon* (1788, 2 T. R. 677; 1 R. R. 585), it was laid down that the inhabitants of a county cannot, as such, be sued; and that since at common law there is no liability on the part of the whole of the inhabitants of a county to any individual sustaining injury through their inaction, the mere incorporation of them will not avail to give the action without the remedy being definitely given by the statute incorporating them. *Parsons v. St. Matthew, Bethnal Green* (1867, L. R. 3 C. P. 56), has decided that this has not been done by the Metropolitan Management Act, 1855 (18 & 19 Vict. c. 120), in the Metropolitan district; and *Gibson v. Mayor of Preston* (1870, L. R. 5 Q. B. 218), in conjunction with *R. v. Mayor, etc., of Poole* (1887, 19 Q. B. D. 602), makes it plain that the law for the country generally has not been altered by the Public Health Act, 1875 (38 & 39 Vict. c. 55).

Although a duty created by statute may not be such as to enable any person injured to bring an action upon the statute, the statutory precaution is nevertheless evidence of the standard of care which should be maintained in the occupation or circumstances to which the statute refers; on the ground that not doing what the Legislature has prescribed as a suitable precaution in similar circumstances, is not doing something which a person of ordinary care would do (*Blamires v. Lancashire and Yorkshire Ry. Co.*, L. R. 8 Ex. 283).

It follows from what has been said, that, in general, local administrative bodies are not liable to private persons for mere failure to carry out powers conferred by statute. The duty to the public may be enforced by *mandamus*, where there is "a present duty to be performed, and a non-performance of that present duty" (per Cockburn, C.J., *R. v. Vestry of St. Luke, Chelsea*, 1861, 1 B. & S. 903, at 912); but where there is a discretion, "it would be absurd to say that any other tribunal is to inquire whether they have exercised their discretion properly or not" (per Lord Tenterden, C.J., *R. v. Mayor, etc., of London*, 1832, 3 Barn. & Adol. 255, at 271). There is no legal duty to carry out any particular plan of operations, but where work is undertaken, a duty arises not to injure anyone by its operation. "If damage ensues as the consequence of work properly done, it must be sought for by a claim for compensation; but if as the result of negligence in the

doing of it, it is properly the subject of an action" (per Lush, J., *Hall v. Mayor, etc., of Batley*, 1878, 47 L. J. Q. B. 148, at 151; *President, etc., of Colac v. Summerfield*, [1893] App. Cas. 187; *Corporation of Raleigh v. Williams*, [1893] App. Cas. 540). In the case of a statutory duty, again, the rule is that where there is no fault there is no liability (*River Wear Commissioners v. Adamson*, 1877, 2 App. Cas. 743; *Richmond Gas Co. v. Mayor, etc., of Richmond*, [1893] 1 Q. B. 56).

No private individual or company may break up a highway for the purpose of laying *gas pipes* or *water pipes* without subjecting themselves to an indictment (*A.-G. v. Cambridge Gas Consumers Co.*, 1868, L. R. 4 Ch. 71); and where a company or corporation have obtained an Act of Parliament enabling them to do so, they are liable, either according to the standard prescribed by their special Act (as in *Hopkins v. Birmingham and Staffordshire Gas-Light Co.*, 1860, 5 H. & N. 74; in Ex. Ch. 6 H. & N. 250), or according to the ordinary rule, only where they are wanting in the duty to use due and reasonable care in their operations (*Mose v. Hastings and St. Leonards Gas Co.*, 4 F. & F. 324; *Snook v. Grand Junction Waterworks Co.*, 2 T. L. R. 308). When duties are prescribed for the members of a community generally, the standard of duty exacted must be in the main the same, and no more care is required than that which, on an average, could reasonably be looked for from an ordinary intelligent man with no special aptitude.

CONTRACTUAL DUTIES.

There is, however, another class of duties where a different standard is exacted. If a man undertakes a duty the performance of which requires skill, his undertaking it implies an engagement to supply the skill adequate for its performance. The maxims of law on this are: *Spondet peritiam artis*, *Spondet diligentiam gerendo negotio parem*, *Imperitia culpæ adnumeratur* (Story, *Bailments*, s. 431). The obligation undertaken is contractual; and thus each contract may (unless some special rule of law intervenes) prescribe its own standard of conduct. In the absence of any particular stipulation, the general rule is as indicated above.

It is in this connection that the interminable discussions as to *degrees of negligence* occur. The sum of their results is shortly this: A man is either acting in his capacity of an ordinary citizen, or he has undertaken special work. If his duty is that of an ordinary citizen, he has to exercise that amount of care in his various relations with others that the ordinary unskilled intelligent citizen may be expected to bring to bear in a like matter. If he does not, he is guilty of negligence. But if he has undertaken special work, he must bring to bear on the performance of it the average skill of a person trained to the special business. If the duty he has undertaken binds him to use skill, and he only uses care, he is guilty of "gross" negligence (*Shiells v. Blackburn*, 1789, 1 Black. H. 158; 2 R. R. 750; *Dartnall v. Howard*, 1825, 4 Barn. & Cress. 345). Again, he may undertake to use care in the custody of gold and jewels, and may bestow only the same amount of precaution he would in the safeguarding of lead or coal, and may lose the gold or jewels; he is guilty of "gross" negligence. Any failure to come up to the standard of duty prescribed by law in any matter which occasions damage to the person to whom the duty is owing, is negligence, and actionable, irrespective of whether the actual want of care is small or great; and it is in this sense that Rolfe, B.'s, dictum (*Wilson v. Brett*, 11 Mee. & W. 113), approved by Willes, J. (in *Grill v. General Iron Screw Collier Co.*, 1866, L. R. 1 C. P. 600), that "gross"

negligence is ordinary negligence with a vituperative epithet, is to be understood. The different position of the person undertaking a duty, the varying character of the things with regard to which the duty is undertaken, and the shifting aspects in which the person and the thing may be viewed as related, have produced a great mass of refined legal doctrines, which cannot be here dealt with in detail. See BAILMENTS; DEPOSIT; MANDATE; HIRING AGREEMENT; AGISTMENT; FACTOR; WAREHOUSEMEN.

There is, however, another class of cases where a different rule has to be applied; where the duty is concerned with the exercise of "a *public employment*," "the case of the common carrier, common hoyman, master of a ship, etc." (*Coggs v. Bernard*, 1704, 1 Sm. L. C., 10th ed., 166, at 178); also of an innkeeper (Y. B. 11 Hen. IV. 45), and, it seems, of a "common farrier" (Paston, J., in Y. B. 19 Hen. VI. 49).

In the case of an innkeeper, "*secundum legem et consuetudinem regni nostri Angliæ*" (the words of the old writ, Plowd. 9 b), the innkeeper is bound to keep the goods of his guest within the inn, "without any stealing or purloining" (*Calve's case*, 1 Sm. L. C., 10th ed., 115, at 117); and the fact of their loss is *prima facie* evidence of negligence (*Dawson v. Chamney*, 1845, 5 Q. B. 164), which may nevertheless be rebutted by showing that the loss was occasioned by the act of God or the king's enemies (*Richmond v. Smith*, 1828, 8 Barn. & Cress.; 32 R. R. 326), or by the contributory negligence of the plaintiff (*Oppenheim v. White Lion Hotel Co.*, 1871, L. R. 6 C. P. 515.) See INNKEEPER.

Again, a common carrier of goods "is an insurer of the goods which he carries" (*Riley v. Hoone*, 1828, 5 Bing. 217, at 224; 30 R. R. 576; *Crouch v. London and North-Western Ry. Co.*, 1854, 14 C. B. 255). This liability is imposed by custom, "to guard against frauds they might be tempted to commit, by taking goods intrusted to them to carry, and then pretending they had lost or been robbed of them" (per Eyre, C.J., *Aston v. Heaven*, 1797, 2 Esp. 533, at 534). But a common carrier of goods is not liable for damage arising—

(1) From act of God (*Coggs v. Bernard*, 1704, 1 Sm. L. C., 10th ed., 167, at 178);

(2) From "the enemies of the king" (*Russell v. Niemann*, 17 C. B. N. S. 163);

(3) From inherent defect of the goods themselves (*Nugent v. Smith*, 1876, 1 C. P. D. 423);

(4) From their dangerous nature, not disclosed to him, so that he may take precautions (*Brass v. Maitland*, 1856, 6 El. & Bl. 470);

(5) Where there has been fraud by the complainant in the matter occasioning the loss (*Gibbon v. Paynton*, 1769, 4 Burr. 2298);

(6) From delay over which the carrier is shown to have no control (*Taylor v. Great Northern Ry. Co.*, 1866, L. R. 1 C. P. 385);

(7) From the execution of legal process on the goods (*Pingree v. Detroit, etc., Railroad Co.*, 11 Am. St. R. 479);

(8) Where he has made a contract under the Carriers Act, 1830 (11 Geo. IV. and 1 Will. IV. c. 68). See CARRIER.

A carrier of passengers is not an insurer, and is "only liable for negligence" (*Crofts v. Waterhouse*, 1825, 3 Bing. 319; 2 R. R. 631). His undertaking is, "as far as human care and foresight could go, he would provide for their safe conveyance." Therefore, if the breaking down of the vehicle in which the passengers are being conveyed is "purely accidental, the passenger has no legal remedy for the misfortune he has encountered"

(*Christie v. Griggs*, 1809, 2 Camp. N. P. 79; 11 R. R. 666). See CARRIER; PASSENGERS.

The duty of railway companies to their passengers is to take reasonable care to use the best precautions in known practical use for securing their safety and convenience. It is not every suggestion of science that should be adopted (*Hanson v. Lancashire and Yorkshire Rwy. Co.*, 20 W. R. 297), but every precaution in known practical use (*Ford v. London and South-Western Rwy. Co.*, 2 F. & F. 730). A duty is imposed to see not only that the conveyance used is fit, but also that "everything under their own control is in full and complete and proper order. They are bound to see also, if there be a certain and definite risk as to which they have any knowledge, or can reasonably be supposed to have any knowledge, that it is sufficiently guarded against" (per Lord Hatherley, C., *Daniel v. Metropolitan Rwy. Co.*, 1871, L. R. 5 H. L. 45, at 55; cp. *Pounder v. North-Eastern Rwy. Co.*, [1892] 1 Q. B. 385, and *Cobb v. Great Western Rwy. Co.*, [1893] 1 Q. B. 459). See RAILWAY.

A carrier of passengers' luggage is liable as a common carrier of goods, where he has charge of the luggage (*Macrow v. Great Western Rwy. Co.*, 1871, L. R. 6 Q. B. 612, at 618); but where a passenger takes luggage into a carriage to be conveyed with him, the contract of the carrier in regard to the conveyance of the luggage is modified to the extent that he is not liable if loss happens by reason of want of care on the part of the passenger himself, who has taken his goods within his own control (*Great Western Rwy. Co. v. Bunch*, 1888, 13 App. Cas. 31; cp. *Bergheim v. Great Eastern Rwy. Co.*, 1878, 3 C. P. D. 221, and *Talley v. Great Western Rwy. Co.*, 1870, L. R. 6 C. P. 44, per Willes, J., at 52).

The rule of *professional* duty is only another aspect of the duty to use skill where work requiring skill is undertaken. "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill" (per Tindal, C.J., *Lamphier v. Phipps*, 1838, 8 Car. & P. 475, at 479), not "an extraordinary degree of skill, but only a reasonable and ordinary proportion of it" (*Chapman v. Walton*, 1833, 10 Bing. 57). He should be conversant with the general principles of law applicable to his profession, and with the methods of practice of most ordinary occurrence; even though knowledge outside the actual scope of his profession is involved, acquaintance with the requirements of the profession is not required (*Jenkins v. Betham*, 1854, 15 C. B. 168). If an extraordinary fee is given for a special degree of skill and experience, the recipient becomes bound to a degree of diligence measured by the consummate skill attributed to him, which secures the unusual fee (see ARCHITECT, AUCTIONEER, ENGINEER, SOLICITOR, MEDICAL PRACTITIONER, BROKER, SURVEYOR). Where a question of professional skill is involved, the question of its exercise obviously cannot be left to a jury in its entirety. The circumstances in which negligence could exist have to be defined by the judge, and the jury have to determine whether the circumstances are found in the case before them (*Hunter v. Caldwell*, 10 Q. B. 69). For example, if the negligence alleged is a disputable matter of engineering construction, most usually the case would not be left to the jury at all; if it is left, it must be with specific directions (*Tuttle v. Detroit Grand Haven & Milwaukee Rwy. Co.*, 22 U. S. (15 Davis) 189; cp. *R. v. Markuss*, 4 F. & F. 356, at 358).

In selecting a *partner*, personal qualities are generally the determining force in the selection; and in this case, in the event of negligence being alleged in the performance of the partnership duties, the accused partner

may discharge himself by showing that his partnership actions are governed by his well-known principles of action. On the other hand, if his personal qualities are of extraordinary capacity, lack of the exercise of these would render him liable. In an ordinary case the ordinary rule *Spondet peritiam artis* holds (see PARTNERSHIP).

The duty of trustees is to exercise "the same degree of vigilance that a man of ordinary prudence would exercise in the management of his own affairs" (per Lord Herschell, *Rae v. Meek*, 1889, 14 App. Cas. 558, at 569). By accepting a trust a person becomes bound to execute it with fidelity and reasonable diligence; and it is no excuse to say that he has no benefit from it, and that it is merely honorary (per Lord Hardwicke, *Charitable Corporation v. Sutton*, 1742, 2 Atk. 400, at 406).

A trustee is personally bound to use his own skill and judgment, and may not rest upon the untested advice of those whose assistance he may see fit to invoke. If he chooses to place reliance on such advice without testing its soundness, he will not escape personal liability if things go wrong through default in proper personal supervision (*Learoyd v. Whiteley*, 1887, 12 App. Cas. 727). The liability of trustees is considerably modified by secs. 1 and 8 of the Trustee Act, 1888 (51 & 52 Vict. c. 59); the Trustee Act, 1893 (56 & 57 Vict. c. 53); and sec. 3 of the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35) (see TRUSTS; JUDICIAL TRUSTEE).

The breach of duty of a person may be such that the law will preclude him from denying the truth of some specific statement, and will fix him with liability in respect of it, as if the statement were true. In the aspect we have here to deal with, this doctrine is known as *estoppel by negligence*. The principle of law may be thus stated: If a man has led others into a belief that a certain state of fact exists by conduct calculated in the ordinary course of things to induce the belief, and those others have acted on that belief to their prejudice, he shall not be heard afterwards as against those others, to show that the state of things he averred to exist did not exist in fact; provided that the conduct complained of must be—(1) in the transaction itself, and the proximate cause of the leading the others into injurious action; and (2) the neglect of some duty owing to them personally, and not merely a duty to third persons with whom they have no privity (*Swan v. North British Australasian Co.*, 1862, 2 H. & C. 175, at 182) (see ESTOPPEL).

CONTRIBUTORY NEGLIGENCE.

Negligence by itself affects no one with liability. Where negligence produces no damage to others it is not actionable. A man has a right to be as negligent as he pleases, provided only that in being negligent he does not interfere with the rights of other people. The corollary of this is that if one man sees another guilty of negligence he cannot stand upon his abstract rights, and, having sustained damage through ignoring the manifest consequences of the other's action, fix the consequences of his persistency on him. He is bound, so far as he can, to avoid the probability of damage brought into being by the negligent act of the other. If he does not do what he can in this direction, he is guilty of contributory negligence, and must himself bear the consequences of his want of care. Contributory negligence, then, is negligence in not avoiding the consequences arising from the negligence of some other person, when means and opportunity are afforded to do so (see, per Coleridge, J., *Clayards v. Dethick*, 1848, 12 Q. B. 439, at 445). Still, as we have just seen that every man is entitled to be as negligent as he pleases, provided his negligence does not work harm to any-

one else; so, where one man has been negligent, the right of another to be negligent also is not curtailed thereby; and although a defendant proves a plaintiff to have been negligent, he does not thereby disentitle him to recover in respect of the defendant's own negligence producing the injury and damage complained of, unless he in addition proves one of two propositions,—(1) that the plaintiff might have avoided the consequences of the defendant's negligence by the exercise of ordinary care; or (2) that the defendant could not have avoided the consequences of the plaintiff's negligence by the exercise of ordinary care (see, per Lord Penzance, *Rudley v. London & North-Western Rwy. Co.*, 1876, 1 App. Cas. 754, at 759), whereby a person is unable to get out of the range of mischief. Physical infirmity is not contributory negligence which disentitles a person to recover for damage sustained through negligence. If the physical infirmity is manifest, as, for example, if a man were lame, a greater duty is owing to him than to the world at large by reason of his defect. If his physical infirmity is not manifest, as, for example, if he be deaf, he is not thereby to be precluded from going about as other people; and if he is injured through the negligence of some other person, it is for the jury to say whether the circumstances of the occurrence show him to have been in the exercise of such an amount of care as should be expected from a person labouring under his infirmity. If, however, the infirmity, which was unknown to the person committing the injury, contributed directly to the catastrophe, there can be no recovery of damages in respect of it (*R. v. William Walker*, 1 Car. & P. 252; *Magwire v. Middlesex Railroad Co.*, 115 Mass. 239, at 240; *M'Kechnie v. Couper*, 24 Sc. L. R. 252). If the contributory negligence relied on is the instinctive act of the person complaining, in his endeavour to avoid the danger occasioned by the wrongful conduct of the wrongdoer, the wrongdoer will not be relieved from the responsibility. For example, a passenger jumped from a coach in terror produced by a situation brought about by the negligence of the coach proprietor, and broke his leg. The coach proprietor cannot shift his liability; for he brought about the situation which naturally produced the catastrophe (*Jones v. Boyce*, 1 Stark N. P. 493). Even if the act which causes the injury is the act of a third person, who voluntarily intervenes between an injuring and a jeopardised person, if the occasion is such as will justify his intervention, and the injuring person is in default, the liability will not be shifted from the original wrongdoer. The Scotch case of *Woods v. Caledonian Rwy. Co.* (13 Rettie, 1118) well illustrates this principle. A young woman was killed while endeavouring to drag her companion out of danger from an approaching train. The railway company was guilty of negligence. The Court refused to hold as matter of law that the young woman's act was contributory negligence.

The rule as to contributory negligence is not inflexibly applied in cases where young persons are concerned. Allowance is made for their inexperience and infirmity of judgment (*Lynch v. Nurden*, 1835, 1 Q. B. 29; *Grizzle v. Frost*, 3 F. & F. 622; *Hughes v. Macfie*, 1858, 2 H. & C. 744; *Crocker v. Banks*, 1887, 4 T. L. R. 324). In the case of very young children, the rule seems to be that an infant can recover, although its conduct contributed to the injury, if the defendant is shown to have failed in his duty to the infant (*Jewson v. Gatti*, 1885, 2 T. L. R. 341; but see *Mangan v. Atterton*, 1866, L. R. 1 Ex. 239). If, however, the infant is in the position in which it sustains the hurt only on the condition that the person who has it in charge should not expose it to risk, and the negligence of that person is the immediate cause of the accident, the Exchequer Chamber has decided that the infant cannot maintain an

action in respect of the hurt it has received (*Waite v. North-Eastern Rwy. Co.*, 1858, El. B. & E. 719). A passenger on a coach or other vehicle is not identified with the negligence of the servants in charge of the vehicle or of the proprietors; and if an accident happens in which they are guilty of contributory negligence, the passenger can recover either against the proprietor of the vehicle in which he is, or against the proprietor of that which negligently comes into collision with the vehicle in which he is, or against both (*Mills v. Armstrong*, 1887-88, 13 App. Cas. 1, overruling *Thorogood v. Bryan*, 1840, 8 C. B. 115). See NEGLIGENT DRIVING; RULE OF THE ROAD.

The defendant who sets up contributory negligence has, in the first instance, the onus upon him of proving it. Till affirmative evidence is given, the plaintiff is not bound to give evidence negating the existence of contributory negligence (*Wakelin v. London & South-Western Rwy. Co.*, 1887, 12 App. Cas. 41).

[*Authorities.*—The principal authorities are appended to articles CONTRACT; TORTS.]

Negligent Driving.—*Criminal Liability.*—An abstract rule as to what will constitute negligent driving can hardly be laid down. It must depend upon all the circumstances of each case. Thus it was held by Bayley, J. (*Knight's case*, 1828, 1 Lew. C. C. 168), that a carter sitting inside a cart, instead of attending at the horse's head, was guilty of negligence; and the fact that, while he was in this position, the cart went over a child, who was upon the road, and killed it, made him guilty of manslaughter. And the same point was ruled by Hullock, B. (*Anon. ibid.* 168). But under other circumstances a driver would be more negligent in being off than on his vehicle.

If a man, breaking an unruly or vicious horse, ride him amongst a crowd, and the horse kick a man and kill him, this is murder, if the rider brought the horse into the crowd with intent to do mischief, or even to divert himself by frightening the crowd (1 Hawk. c. 31, s. 68); but manslaughter if done heedlessly and incautiously only (1 East P. C. 231).

If a person driving a carriage happens to kill another, and he saw or had timely notice of the mischief likely to ensue, and yet wilfully drove on, it will be murder; for the presumption of malice arises from the doing a dangerous act intentionally (1 Hale, 476; Fost, 263; 1 East P. C. 263). If the driver might have seen the danger, but did not look before him, it will be manslaughter for want of due circumspection (*ibid.*). And generally it may be laid down, that where one by his negligence has contributed to the death of another, he is guilty of manslaughter (*R. v. Swindall*, 1846, 2 Car. & Kir. 230).

Upon an indictment for manslaughter by negligent driving, the burden of proving negligence does not lie upon the Crown; but, upon the fact of the killing being proved, it is cast upon the prisoner to show that he has used due and proper care in driving (*R. v. Cavendish*, 1873, 8 Ir. R. C. L. 178 C. C. R.). Where it appeared that the deceased was walking in the road drunk, when the prisoner, who was in a cart driving two horses without reins, and going at a furious pace, ran over him and killed him, it was held that this was manslaughter, although the prisoner had called out twice to the deceased, who, from the state in which he was, and the pace of the horses, could not get out of the road (*R. v. Walker*, 1824, 1 Car. & P. 320, Garrow, B.). If the driver of a carriage be racing with another car-

riage, and from being unable to pull up his horses in time, the carriage which he is driving is upset, and a person thrown off it and killed, this is manslaughter in the driver (*R. v. Timmins*, 1836, 7 Car. & P. 499). So, if the drivers of two carriages be racing upon a highway, and one of them runs over a man and kills him, both are guilty of manslaughter (*R. v. Swindall*, 1846, 2 Car. & Kir. 230). If a man undertakes to drive another gratuitously, he is bound to exercise proper care in regard to his safety; and if, by culpably negligent driving, he causes his death, he will be guilty of manslaughter. But he cannot be found guilty if the deceased himself interfered in the management of the horse, and thereby assisted in bringing about the accident (*R. v. Jones*, 1870, 11 Cox C. C. 544, Lush. J.). It is no defence to an indictment for manslaughter, where the death of the deceased is shown to have been caused in part by the negligence of the prisoner, that the deceased was also guilty of negligence, and so contributed to his own death (*R. v. Swindall*, 1846, 2 Car. & Kir. 230; *R. v. Jones*, 1870, 11 Cox C. C. 544; *R. v. Kew*, 1872, 12 Cox C. C. 355). When a person has been killed in such a manner that no want of care could be imputed to the driver, it will be accidental death, and he will be excused (1 Hale, 476; 1 East P. C. 263).

If any bodily harm be done to any person by the wanton or furious driving or racing, or other wilful misconduct, or by the wilful neglect of the person in charge of any carriage, the latter is guilty of a misdemeanour, and indictable under the 24 & 25 Vict. c. 100, s. 35.

Sec. 78 of the Highway Act, 1835 (5 & 6 Will. IV. c. 50), in so far as it relates to the subject-matter of this article, enacts that, if the driver of any carriage on any highway shall by negligent or wilful misbehaviour cause any damage to any person, horse, cattle, or goods conveyed in any carriage upon such highway, or negligently or wilfully be at such a distance from such carriage as not to have the management of the horse, etc., drawing the same, or shall leave any carriage upon such highway so as to obstruct the passage thereof; or if the driver of any carriage, or of any horses, etc., meeting any other carriage or horses, etc., shall not keep his carriage or horses, etc., on the left or near side of the road (see RULE OF THE ROAD); or if any person shall in any manner wilfully prevent any other person from passing him, or any carriage or horses, etc., under his care, or by negligence or misbehaviour interrupt the free passage of such highway, or shall not keep his carriage, or horses, etc., on the left side of the road, so as to allow such passage; or if any person riding any horse, or driving any carriage, shall ride or drive the same furiously, so as to endanger the life or limb of any passenger; the person so offending shall, in addition to any civil action to which he may make himself liable, forfeit a sum not exceeding £5 if not the owner, or £10 if the owner of such carriage, etc.; and may be apprehended by any person who sees the offence committed.

By sec. 35 (1) of the Local Government Act, 1888 (51 & 52 Vict. c. 41), bicycles, etc., are declared to be carriages within the meaning of the Highway Acts.

Under 2 & 3 Vict. c. 47, s. 54, every person who, within the Metropolitan Police District, "shall ride or drive furiously, or so as to endanger the life or limb of any person, or to the common danger of the passengers in any thoroughfare," is liable to a penalty of not more than 40s. Police constables are empowered to take a person into custody without warrant, who may commit any such offence "within view of any such constable"; and this power is not confined to cases where the offender's name and residence is unknown (*Justice v. Gosling*, 1852, 21 L. J. C. P. 94).

Civil Liability.—Where damage has been caused by collision, there may be negligence on one side only, or negligence on both sides; both parties may be to blame; or it may be altogether an accident. The following rules would appear to fix the liabilities of the parties concerned, under whatever circumstances the damage may be inflicted (Oliphant on *Horses*, 5th ed., 287):—

(1) If a party who is taking reasonable and proper care receives damage in consequence of a horse or carriage he encounters being negligently managed, the person who has the control over such horse or carriage is liable.

Thus, if a man drives a carriage at an improper pace, having regard to the hour and place, *e.g.* at the rate of nine or ten miles an hour, after dark, in a crowded thoroughfare, and in so doing collides with and injures a foot-passenger, who is taking reasonable and proper care in crossing the road, but on account of the extraordinary speed of the carriage is unable to save himself, the driver of the carriage is liable to an action for his negligence (*Woolf v. Beard*, 1838, 8 Car. & P. 373). So if a man drives furiously round a corner, and injures a person on the further side (*Mayor of Colchester v. Brooke*, 1845, 7 Q. B. 359). So also where the plaintiff was a passenger on the top of an omnibus, which was struck by the defendant's omnibus, and the consequence was that the omnibus on which the plaintiff sat, continuing its course, ran against some obstacle, and he was thrown off and injured, it was held by the Court of Exchequer that the defendant was liable (*Rigby v. Hewitt*, 1850, 5 Ex. Rep. 240). If a horse and cart are left standing in the street, without any person to watch them, the owner is liable for any damage done by them, though it be occasioned by the act of a passer-by in striking the horse (*Illidge v. Goodwin*, 1831, 5 Car. & P. 190). The driver of a public vehicle is bound to be a skilful driver, and any damage arising from his unskilful driving is a ground of action. A less degree of skill is to be looked for from the driver of a private vehicle; but he is bound to drive with reasonable care and skill, and is liable for any accident which may arise from his culpable negligence (*Collier v. Chaplin*, per Byles, J., at N. P., Feb. 1, 1865; see also *Moffat v. Bateman*, 1869, L. R. 3 P. C. 115).

Independently of any negligence in the act of driving, an action will also lie in respect of damage sustained in a collision resulting from the negligence of the defendant in harnessing a horse to a carriage which is much too small for it (*Burkim v. Bilezkddgi*, 1889, 53 J. P. 760). The owner of a carriage is bound to have good tackle, and he is liable for an accident in consequence of its breaking. This was so held where the chain-stay of a cart broke, and the horse, being frightened, ran away and did damage (*Welsh v. Lawrence*, 1818, 2 Chit. 262; see also *Templeman v. Haydon*, 1852, 19 L. T. O. S. 218); and where, in consequence of the reins breaking, a foot-passenger was run over and injured (*Cotteril v. Turley*, 1839, 8 Car. & P. 691).

(2) Where damage is not the necessary consequence of a particular wrongful act, the person sustaining damage, though a wrong-doer, may recover against the person causing it, if it be shown that with ordinary care on the part of the latter the injury might have been avoided.

The subject of negligence on both sides was fully considered by the Court of Exchequer in *Bridge v. Grand Junction Canal Co.* (1838, 3 Mee. & W. 244), and Parke, B., there said: "The rule of law is laid down with perfect correctness in the case of *Butterfield v. Forrester* (1809, 11 East, 60; 10 R. R. 433), that although there may have been negligence on the part of the plaintiff, yet unless he might by the exercise of ordinary care have

avoided the consequences of the defendant's negligence, he is entitled to recover. But if by ordinary care he might have avoided them, he is the author of his own wrong." This is a qualification of the rule, that the contributory negligence of the plaintiff will in general afford a defence, and has latterly been stated in a somewhat different form, namely, "that if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him" (*Radley v. L. and N.-W. Ry. Co.*, 1876, 1 App. Cas. at p. 759, Lord Penzance). A person who is guilty of negligence, and thereby produces an injury to another, cannot set up as a defence that part of the mischief would not have arisen if the latter had not himself been guilty of some negligence (*Greenland v. Chaplin*, 1850, 5 Ex. Rep. 243).

As a general rule of law, everyone in the conduct of that which may be harmful to others if misconducted is bound to use due care and skill, and the wrong-doer is not without the pale of the law for this purpose (*Mayor of Colchester v. Brooke*, 1845, 7 Q. B. 377, per Lord Denman, C.J.). Therefore, where the defendant negligently drove his horses and waggon against and killed an ass, which had been left on the highway fettered in the fore feet, and was thus unable to get out of the defendant's way, Erskine, J., told the jury that, though the act of the plaintiff in so leaving the ass might be illegal, still, if the proximate cause of the injury was attributable to the want of proper conduct on the part of the defendant, the action was maintainable; and this direction was subsequently upheld by the Court of Exchequer (*Davies v. Mann*, 1842, 10 Mee. & W. 546).

(3) Where one party by his improper conduct makes it impossible for the other party, who is also acting improperly, to avoid doing him damage, the person inflicting the injury is not liable, because the negligence of both parties concurs in producing it.

Where the plaintiff, in crossing a road, was knocked down and injured by the defendant's cart, Tindal, C.J., told the jury that they must be satisfied that the injury was attributable to the negligence of the driver, and to that alone, before they could find a verdict for the plaintiff; for if they thought it was occasioned in any degree by the improper conduct of the plaintiff in crossing the road in an incautious and imprudent manner, they must find their verdict for the defendant (*Hawkins v. Cooper*, 1838, 8 Car. & P. 473; see also *Pluckwell v. Wilson*, 1832, 5 Car. & P. 375). But at the present day, "the received and usual way of directing a jury . . . is to say that if the plaintiff could, by the exercise of such care and skill as he was bound to exercise, have avoided the consequence of the defendant's negligence, he cannot recover" (*Dublin, etc., Ry. Co. v. Slattery*, 3 App. Cas. at p. 1207, Lord Blackburn).

In the case of *Thorogood v. Bryan* (8 C. B. 130), where a person was run over and killed by an omnibus which was racing, and the negligence of the driver of the omnibus, in which the deceased was a passenger, was relied on as a defence to the action brought by his widow, it was held that the deceased, having trusted the party by selecting the particular conveyance, had so far identified himself with the carriage in which he was travelling that want of care on the part of its driver was a defence for the driver of the other carriage which directly caused the injury; and that this was in accordance with the opinion expressed by the Court in *Bridge v. Grand Junction Canal Co.* (*ubi supra*). The soundness of this doctrine was, however, doubted from the first in this country, and subsequently in Scotland and the United States, and the former case has now been definitely overruled (*Mills v. Armstrong*, 1888, 13 App. Cas. 1).

(4) Where damage is the consequence of pure accident, neither party is answerable.

This was held to be the case where the defendant's horse, being frightened by the sudden noise of a butcher's cart, which was driven furiously along the street, became ungovernable, and plunged the shaft of a gig into the breast of the plaintiff's horse (*Wakeman v. Robinson*, 1823, 1 Bing. 213). And the same conclusion was arrived at where a horse ridden by the defendant was frightened by a clap of thunder, and ran over the plaintiff, who was incautiously standing with others in the carriage road (*Gibbons v. Pepper*, E. T. 7 Will 3, 1 Raym. (Ld.) 38).

In *Hammack v. White* (1862, 11 C. B. N. S. 588), the defendant, having bought a horse at Tattersall's, the next day took him out to try him in a much-frequented thoroughfare. From some unexplained reason the horse became restive, and, notwithstanding the defendant's well-directed efforts to control him, ran upon the pavement, and killed a man. It was held that these facts disclosed no evidence of negligence which the judge was warranted in submitting to the jury; Erle, C.J., saying: "I am of opinion that the plaintiff in a case of this sort is not entitled to have his case left to the jury, unless he gives some affirmative evidence that there has been negligence on the part of the defendant." In all cases, therefore, where a horse runs away and inflicts an injury, if the rider or driver have not acted in such a manner as would lead a jury to suppose that his conduct must have contributed to the accident, he is not answerable (*Holmes v. Mather*, 1875, L. R. 10 Ex. 261; *Manzoni v. Douglas*, 1880, 6 Q. B. D. 145). But the rule that a person is not answerable for injury resulting from circumstances over which he has no control, admits of this qualification, namely, that if he is aware beforehand that the circumstances in which, of his own free will, he is about to place himself, will put him in a position over which he has no control, and in which he will probably cause injury to others, he will then be answerable for an injury so caused. Thus, if in *Hammack v. White* (*supra*) the defendant had been proved to have known beforehand that the horse was vicious and unmanageable, he would have been held responsible (see judgment of Willes, J., in *Hammack v. White*, 11 C. B. N. S. at p. 597; see also *Villiers v. Avey*, 1887, 3 T. L. R. 812).

Negligent Driving by a Servant.—It was formerly held that the master was liable only where his servant caused injury by doing a lawful act negligently, but not where he wilfully did an illegal one (*Lyons v. Martin*, 1838, 8 Ad. & E. 515, per Patterson, J.; see also *M'Manus v. Crickett*, 1800, 1 East, 106; 5 R. R. 518). But it is now settled law that the true test of the master's liability is, not whether the acts of his servants are illegal and wilful, or the contrary, but whether they are within the scope of the servant's employment, and in the execution of the service for which he is engaged (*Limpus v. General Omnibus Co.*, 1862, 1 H. & C. 526). If, therefore, a driver in the employ of an omnibus company, with a view to further his employers' interests, drives the omnibus of which he is in charge across the road in front of a rival omnibus, in consequence of which the latter is overturned, the company will be liable; and it is immaterial that the company's driver had distinct instructions not to obstruct any other omnibus (*Limpus v. General Omnibus Co.*, *ubi supra*). But it would be otherwise if the act of the company's driver was an act of his own, and in order to effect a purpose of his own, as in such case it could not be said to be an act done in the course of his employment (*ibid.*).

Generally speaking, the relationship of master and servant will not be

inferred (*London General Omnibus Co. v. Booth*, 1893, 63 L. J. Q. B. 244). Under the London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), so far as the public is concerned, the registered proprietor of a cab is responsible for the acts of his driver whilst he is plying for hire as if the relationship of master and servant existed between them, even though it does not in fact exist (*King v. London Improved Cab Co.*, 1889, 23 Q. B. D. 281, C. A.; see also *Keen v. Henry*, [1894] 1 Q. B. 292, C. A.); and he is therefore liable for personal injury to a passenger or a stranger (*Venables v. Smith*, 1877, 2 Q. B. D. 279), or damage to the horse or carriage of another (*Keen v. Henry*, *ubi supra*), caused by the negligence of the driver, where there is no wrongful user by the driver.

Where a master and servant are together in a vehicle, and an accident occurs from which an immediate injury ensues, the master is liable, although the servant is driving, and there is no evidence of any interference on the master's part; and even where the evidence on the part of the defendant strictly negatives an interference, the presence of the master with the servant will constitute him a trespasser if the act of the servant amount to a trespass (*Chandler v. Broughton*, 1832, 1 C. & M. 29). A master is also liable in an action for damage resulting from the negligence with which his carriage has been driven, although it appears that his servant was not driving at the time of the accident, but had intrusted the reins to a stranger who was riding with him (*Booth v. Miste*, 1835, 7 Car. & P. 66). It is doubtful whether the servant of the proprietor of a public vehicle has an implied authority, in cases of sudden emergency, to appoint another person to act as servant on his master's behalf, but it is clear that a servant employed to drive such a vehicle has no authority to delegate the performance of his duty to another person, unless there is a necessity for so doing (*Gwilliam v. Twist*, [1895] 2 Q. B. 84).

If a servant driving his master's carriage, in order to effect some purpose of his own, wantonly strikes the horse of another person, and produce an accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in the course of the servant's employment (*Croft v. Alison*, 1821, 4 Barn. & Ald. 592). The fact that a passenger in an omnibus is struck by the driver's whip is *prima facie* evidence of negligence by the driver in the course of his employment; and even if it appears that the blow was struck at the servant of another omnibus, with whom there had been a dispute, it is a question for the jury whether the blow was struck by the driver in private spite, or in supposed furtherance of his employer's interests (*Ward v. General Omnibus Co.*, 1873, 42 L. J. C. P. 265, Ex. Ch.).

If a servant driving his master's cart or carriage, on his master's business, makes a *detour* from the direct road for some purpose of his own, the master will be liable for any injury occasioned by his negligent driving while so out of the road (*Joel v. Morrison*, 1834, 6 Car. & P. 501; *Whatman v. Pearson*, 1868, L. R. 3 C. P. 422). But it is otherwise if a servant, without his master's permission, and for a purpose of his own wholly unconnected with his master's business, takes out his master's vehicle, and by his negligent driving causes damage to another person, for in such case it is clear that the servant is acting beyond the scope of his employment (*Mitchell v. Crassweller*, 1853, 22 L. J. C. P. 100; *Storey v. Atshon*, 1869, L. R. 4 Q. B. 476; *Rayner v. Mitchell*, 1877, 2 P. C. D. 359).

Where a master sent his servant on an errand, and he took and rode a

horse belonging to another person without his master's permission, and on his way back inflicted an injury on the plaintiff, Park, J., said, "I cannot bring myself to go the length of supposing that if a man sends his servant on an errand without providing him with a horse, and he meets a friend who has one, who permits him to ride, and an injury happens in consequence, the master is responsible for that act" (*Goodman v. Kennel*, 1827, 3 Car. & P. 167). According to the language used in the report of the case of *Stables v. Eley*, 1825, 1 Car. & P. 614, it has been held that if, in an action for negligent driving, it appears that the defendant has held himself out to the world as the owner of a cart by suffering his name to remain painted on it, and over the door of the house of business to which it belongs, an action is maintainable against him in respect of the negligence of the driver, although it is proved that he had for some days ceased to be the owner of the cart, or to be concerned in the business. But this case was recently disapproved in the Court of Appeal (*Smith v. Bailey*, [1891] 2 Q. B. 403), Lord Esher, M. R., remarking that it must be either misreported or wrong, and that the utmost effect that can be given to the decision is that under such circumstances there would be *prima facie* evidence of liability, which might be met, however, by showing the truth of the matter; and in this opinion Bowen and Kay, L.JJ. concurred. See RULE OF THE ROAD.

[*Authority*.—Oliphant on *Horses*, 5th ed., by C. E. Lloyd.]

Negotiable Instrument.—1. *Definition*.—An instrument is negotiable when it is such that the title to the debt or other right secured by it passes, unaffected by any defect or want of title of the deliverer, by the mere delivery of the instrument, to anyone who takes it for value and in good faith (below 10), that is to say, honestly believing the deliverer to be the true owner of the instrument, or else to be authorised by the true owner to dispose of it (Willis on *Negotiable Securities*; Smith's *Mercantile Law*, 10th ed., p. 217; *London Joint-Stock Bank v. Simmons*, [1892] App. Cas. 201).

Instruments such as bills of lading (see vol. ii. p. 122), which represent for purposes of delivery the property to which they relate; instruments which are capable of being made negotiable in the sense defined, as cheques or bills requiring indorsement (*Whistler v. Forster*, 1863, 14 C. B. N. S. 248; see vol. ii. p. 502); and instruments which have ceased to be negotiable, as an overdue or restrictively indorsed bill of exchange, or a cheque crossed "not negotiable," are sometimes loosely referred to as "negotiable," but they do not possess the characteristic feature of negotiability, namely, that the title of a *bonâ fide* holder for value is independent of the titles of his predecessors.

2. *The holder can sue upon the Instrument*.—The holder of a negotiable instrument can always sue the person bound by the obligation to which it constitutes a title, in his own name, if such obligation is capable of being brought into suit at all.

Instruments may be negotiable although no person is liable to be sued upon them, as in the case of exchequer bills, and foreign and colonial government bonds. The fact that the holder can sue does not, of itself, make the instrument negotiable, although, with the exception just mentioned, it is an incident of negotiability (*Crouch v. Credit Foncier of England*, 1873, 8 Q. B. 374). The holder of an overdue bill delivered after maturity, or of a delivery order (vol. iv. p. 203), the assignee of a Scotch bond (*Innes*

v. *Dunlop*, 1800, 8 T. R. 595), or the indorsee of a bill of lading (Bills of Lading Act, 1855, vol. ii. p. 125), is, or may be, entitled to sue in his own name, so also is the assignee of a chose in action under sec. 25 (6) of the Judicature Act, and, in some cases, an equitable assignee (see vol. v. p. 37); but in each of these cases the holder, indorsee, or assignee has no better title than the person from whom he obtained the instrument.

3. *Recognised Negotiable Instruments*.—The following instruments are judicially recognised as being negotiable in this country:—Bills of exchange, promissory notes, and cheques (see separate articles), and bankers' circular notes (*Conflans Co. v. Parker*, 1867, L. R. 3 C. P. 1), all being duly indorsed if requiring indorsement, and not overdue or restrictively indorsed; bank notes (vol. i. p. 476), exchequer bills in blank (*Wookey v. Pole*, 1820, 4 Barn. & Ald. 1; 22 R. R. 594; *Brandao v. Barnett*, 1846, 12 Cl. & Fin. 787; see vol. v. p. 105), and India bonds (51 Geo. III. c. 64), and also the stock (*Gorgier v. Mievill*, 1824, 3 Barn. & Cress. 45; 27 R. R. 290), bonds (*Symons v. Mulhern*, 1882, 30 W. R. 875), and scrip (*Goodwin v. Roberts*, 1875, L. R. 10 Ex. 337; 1 App. Cas. 476) expressed to be payable to bearer, of foreign or colonial governments (*London and County Bank v. London and River Plate Bank*, 1888, 21 Q. B. D. 535). The history of the gradual admission to a status of negotiability of the instruments enumerated is traced at length in the judgment of the Court of Exchequer in *Goodwin v. Roberts* (L. R. 10 Ex. p. 338).

4. *Instruments held not to be Negotiable*.—The following instruments have been held not to be negotiable:—Bills of lading (vol. ii. p. 122); iron notes or warrants (*Dixon v. Bovill*, 1856, 3 Macq. H. L. Cas. 1); but see *Mercantile Banking Co. v. Phoenix Bessemer Co.*, 1877, 5 Ch. D. 205 (where the warrants were held to be inconsistent with a vendor's lien); post office orders unsigned by the payee (*Fine Art Society v. Union Bank of London*, 1886, 17 Q. B. D. 705). In *Crouch v. Credit Foncier* the debentures of an English company made payable to bearer were held not to be negotiable, in spite of a custom to the contrary. As to this case, see below, 6.

Share-warrants of a limited company, issued under the Companies Act, 1867, ss. 27–36, appear to be negotiable, unless (as suggested by Mr. Willis) the provisions of sec. 29 of the Act, that the bearer shall be entitled to be registered as a shareholder, is to be restricted to the case of a bearer with an independent title. Such limitation would appear to defeat the object of the Act.

5. *Negotiability by Custom*.—*Foreign instruments*, whether comprising government obligations (above, 3) or the obligations of private corporations, as cedula bonds (*London Joint-Stock Bank v. Simmons*, [1891] 1 Ch. 270; [1892] App. Cas. 201); and railway bonds to bearers (*Easton v. London Joint-Stock Bank*, 1886, 34 Ch. D. 95; *Bentinck v. London Joint Stock Bank*, [1893] 2 Ch. 120), may by custom become negotiable in England.

Such instruments, apart from custom, are not negotiable here, by reason that they are negotiable abroad (*Picker v. London & County Bank*, 1887, 18 Q. B. D. 515), and if the custom is established, it is immaterial whether the instrument is negotiable or not in its country of origin (*Williams v. Colonial Bank*, 1888, 38 Ch. D. at p. 403; *Venables v. Baring*, [1892] 3 Ch. 527; see further, BLANK TRANSFER, vol. ii. pp. 167, 169).

The evidence of custom must show not only that the instrument is transferable by delivery, but that it passes free from defects in the title of the transferor (see *Simmons v. London Joint-Stock Bank*, [1891] 1 Ch. at pp. 289, 294; the House of Lords thought the evidence given, and an admission made, were, in fact, sufficient, [1892] App. Cas. 201). In

Venables v. Baring ([1892] 3 Ch. 527), Kekewich, J., in finding in favour of the custom as to the bonds there in question, acted upon his own knowledge of what has been the practice respecting other bonds of a like nature (*ibid.* p. 540). In some cases comment has been made upon the narrowness of the class of persons among whom an alleged custom has been shown to prevail (e.g. by Bowen, L.J., in *Easton v. London Joint-Stock Bank*, 1886, 34 Ch. D. at p. 113), but in the cases first above cited evidence extending to bankers and stockbrokers in London was acted upon as sufficient.

Custom cannot make an instrument negotiable if the terms of the instrument are inconsistent with negotiability. Thus, a share certificate, stating that the shares referred to are transferable in the company's books, cannot be negotiable (*London and County Bank v. London and River Plate Bank*, 1887, 20 Q. B. D. 232, not appealed on this point; *Colonial Bank v. Hepworth*, 1887, 36 Ch. D. 36), and it makes no difference, apart from estoppel (below, 8), that the certificate has a transfer in blank endorsed on the back of it and signed—at any rate, if it is signed only by the executors of the shareholder named within it (*Colonial Bank v. Cady*, 1890, 15 App. Cas. 267). In *Partridge v. The Bank of England* (1846, 9 Q. B. 396), a dividend warrant in respect of public stock, not containing the words “or bearer,” was held not to be negotiable, although always treated by bankers as being so. It has been held that a bond under seal, and comprising a collateral mortgage security, may be negotiable by custom (*Venables v. Baring*, [1892] 3 Ch. 527; cp. Bills of Exchange Act, 1882, ss. 91 (2) and 83 (3)).

6. *Negotiability by Custom: English Instruments.*—The question whether an English instrument, not belonging to any class already judicially recognised as negotiable, can become negotiable by custom has been much debated, and is still unsettled. In *Crouch v. Credit Foncier of England* (1873, L. R. 8 Q. B. 374), Blackburn, J., delivering the judgment of himself and Quain and Archibald, J.J., answered the question in the negative, on the ground that no modern usage can alter the law merchant so as to affix the incidents of negotiability to new forms of instruments (see CUSTOM, vol. iv. pp. 62, 69). This ruling was disapproved by the Court of Exchequer in *Goodwin v. Robarts* (1875, L. R. 10 Ex. 337), in which case the judgment of the Court (Cockburn, C.J., and Mellor, Lush, Brett, and Lindley, J.J.), delivered by Cockburn, C.J., laid down the rule that a modern usage to treat a particular class of instruments as negotiable, if sufficiently general, ought to be adopted by the Courts in any case where it is not contrary either to statute or to express authority. The actual decisions in the two cases are consistent, because the customary negotiability of foreign instruments was well established before the former case, and was recognised by Blackburn, J., and the instruments in question in the latter case were foreign scrip. *Goodwin v. Robarts* was affirmed on appeal to the House of Lords (1 App. Cas. 476), but although Lords Cairns and Hatherley made no reference to any distinction between foreign and English instruments, Lord Selborne did so, and the question of the ruling in *Crouch v. Credit Foncier* was left undetermined. In *Rumball v. Metropolitan Bank* (1877, 2 Q. B. D. 194) an English instrument was held, as between the true owner and a *bonâ fide* holder for value, to be negotiable by custom, and *Crouch v. Credit Foncier* was treated as overruled (see also *Venables v. Baring*, [1892] 3 Ch. 527). The actual decision in *Crouch v. Credit Foncier*, that the holder of the debenture could not sue the company issuing it for payment, has never, in fact, been overruled. In the *London and County Bank v. London and River Plate Bank* (1887, 20 Q. B. D. 238), where the instrument was, in

form, inconsistent with negotiability, Manisty, J., said that he preferred to follow Lord Blackburn's judgment rather than that of Cockburn, C.J., but he seems to have been under the misapprehension that the latter was based upon estoppel. The distinction between a foreign instrument, which cannot be put in suit against the obligor in this country, and an English instrument, is a material one, but it seems probable, nevertheless, that no distinction between English and foreign instruments in regard to negotiability by custom would now be made by the Courts. There is no doubt that numerous English instruments are in practice treated as negotiable by custom, *e.g.* ordinary debentures to bearer (see Palmer, *Company Precedents*, 6th ed., p. 620). See further below, 7 and 8.

7. *Negotiability by Contract*.—An instrument not falling within one of the recognised classes cannot be made negotiable by any agreement of the parties embodied in it (*Dixon v. Bovill*, 1856, 3 Macq. H. L. Cas. 1; *Crouch v. Credit Foncier*, *supra*), although the terms of the instrument may raise an estoppel (below, 8). But where an obligation is expressed to be due to the bearer free from any equities attaching to it in the hands of previous holders, the bearer has an equitable right against the obligor, *e.g.* to prove in, or petition for, the winding up of a company (see *In re Romford Canal Co.*, 1883, 24 Ch. D. 85, and the cases there cited, and Palmer's *Company Precedents*, 6th ed., p. 623), and if the obligor pay the bearer he cannot be sued again by the true owner (see *Natal Investment Co.*, 1868, L. R. 3 Ch. 355 at p. 361). Further, if, as in Mr. Palmer's well-known form of a debenture to bearer, all persons are invited to act upon a representation that the company will treat the instrument as negotiable, there may be a fresh contract between the company and each successive holder, upon the principle of the cases of contract by advertisement (*e.g. Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256).

8. *Estoppel*.—If an instrument purporting to pass by delivery is placed by the true owner in the hands of an agent or mortgagee, who delivers it to a *bonâ fide* holder for value, the true owner is estopped from denying that the instrument is negotiable (*Goodwin v. Roberts*, 1 App. Cas. at p. 476, per Lord Cairns, *Rumball v. Metropolitan Bank*, 1877, 2 Q. B. D. 194).

A share certificate with a blank transfer indorsed upon it and signed is not such an instrument (*Swan v. North British Australian Co.*, 1863, 32 L. J. Ex. 273; *Williams v. Colonial Bank*, 1888, 38 Ch. D. 388, *aff. as Colonial Bank v. Cady*, 1890, 15 App. Cas. 267; see BLANK TRANSFER, vol. ii. p. 166), nor are unsigned post office orders (*Fine Art Society v. Union Bank of London*, 1886, 17 Q. B. D. 705).

9. *Stolen Instruments*.—Debentures filled up and sealed, but never issued by the company, if stolen from it, although transferred to a *bonâ fide* holder, are not binding upon the company (*Mowatt v. Castle Co.*, 1886, 24 Ch. D. 58), because they never were issued as negotiable instruments. See STOLEN BILL.

A stolen negotiable instrument does not revert in the true owner upon conviction of the thief (*Chichester v. Hill*, 1882, 52 L. J. Q. B. 160).

10. *Negligence, Undervalue*.—A holder is not the less a holder in good faith because he has been negligent (*Raphael v. Bank of England*, 1855, 17 C. B. 161; *Simmons v. London and Joint-Stock Bank*, [1892] App. Cas. 201), and the doctrine of constructive notice has no application to negotiable instruments (*l.c.*). By *value* in the definition is meant any value. The holder of negotiable instruments which have been wrongfully taken from and then returned to him by the guilty party, was held in the *London and County Bank v. London and River Plate Bank* (1888, 21 Q. B. D. 540)

to have obtained them for value on their return, although he did not know of the loss. But negligence and inadequate value may be cogent evidence of actual want of good faith (*Goodman v. Harvey*, 1836, 4 Ad. & E. 870; *Jones v. Gordon*, 1877, 2 App. Cas. 616).

11. *Foreign Indorsement*.—Where an inland bill (see vol. ii. p. 95) is indorsed in a foreign country, the indorsement is, as regards the *payor* (but not as regards persons claiming payment, *Alcock v. Smith*, [1892] 1 Ch. 238), to be interpreted according to the law of England (Bills of Exchange Act, 1882, s. 72 (2)). This is because the acceptor's contract on such a bill is to pay according to any order valid by English law (*Label v. Tucker*, 1867, L. R. 3 Q. B. 77). So where a bill payable to order was drawn, accepted, and payable in England, and was indorsed in Paris, but not according to the requirements of the French code, the indorsee recovered against the acceptor (*l.c.*). In other cases the effect of a foreign indorsement is to be determined by the local law (s. 72 (2); *Trimbey v. Vignier*, 1834, 1 Bing. N. C. 151; see *Bradlaugh v. De Rin*, 1870, L. R. 5 C. P. 473). See further as to conflict of laws in regard to bills of exchange, vol. ii. p. 106.

[*Authorities*.—The note to *Miller v. Race* in Smith's *L. C.*; Willis on *Negotiable Securities*; Palmer's *Company Precedents*, 6th ed., p. 620; and the summary of the decided cases at the end of Chalmers' *Bills of Exchange*.]

Negotiating Fee.—See SOLICITOR, *Solicitors' Remuneration*.

Negotiations.—See SOLICITOR, *Solicitors' Remuneration*.

Negotiorum gestio.—Negotiorum gestio, according to the civilians, was a kind of spontaneous agency, or an interference by one in the affairs of another in his absence, from benevolence or friendship, and without authority (2 Kent, *Com.* 616 *n.c.*). The subject is one which may be conveniently considered under the following heads:—(1) The rights of the negotiorum gestor against the person with whose property he has intermeddled; (2) the rights of the owner of the property against the negotiorum gestor; (3) the mutual rights and liabilities of the negotiorum gestor and any person whom he has employed in connection with the property; and (4) the rights of the owner of the property against any third person so employed by the negotiorum gestor.

(1) Pothier (*de Mandat.* v. 17) gives the quaint illustration of Peter, his friend, going a journey without engaging any person to look after his business, and he himself engaging some third person to gather the said Peter's grapes during his absence. The civil law would have given Pothier an action for services rendered against his friend Peter, provided the business was such as the good of Peter's affairs rendered necessary to be done (Justinian, *Inst.* bk. iii. tit. 27, s. 1; and see the notes on p. 51 of Livermore on *Agency*, vol. i.); but the common law has not adopted these rules, and will not allow one man by a voluntary payment or the voluntary rendering of services to make another man liable to him (*French v. Backhouse*, 1771, 5 Burr. 2727; *Child v. Morley*, 1800, 8 T. R. 610; *Exall v. Partridge*, 1799, 8 T. R. 310; 4 R. R. 656). This principle is well illustrated by the case of *Falcke v. The Scottish Imperial Insurance Co.* (1886, 34 Ch. D. 249), where the question to be decided was whether the payment

of premiums on a policy of life insurance by the owner of the equity of redemption of the policy gave him a lien on the policy for the amount of such debt. Lord Justice Bowen says: "The general principle is beyond all question that work or labour done, or money expended by one man to preserve or benefit the property of another, do not, according to English law, create any lien, nor even, if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs, any more than you can confer a benefit on a man against his will." After referring to the special principles applicable to salvage, he goes on: "With regard to ordinary goods upon which labour or money is expended, with a view of saving them or benefiting their owner, there can, as it seems to me, according to the common law, be only one principle upon which a claim for repayment can be based, and that is where you find facts from which the law will imply a contract to repay or give a lien." Scotch law, however, which is to a very large extent founded on the civil law, seems to adopt the opposite view (see *Dunbar v. Chiene*, 1887, 5 Rettie, 210). In this case a landed proprietor having become insane, his brother, without judicial or other authority, managed his estate with the assistance of the law-agents, who had previously managed the estate for the proprietor. After two years a *curator bonis* was appointed to the proprietor, and in an action by the curator against the law-agents, it was held by the Second Division that the law-agents, having acted in good faith, were entitled to the ordinary remuneration for their services.

(2) The general rule is that a person who interferes without any actual mandate ought to exert the requisite skill to accomplish the object or business which he undertakes, to do everything which is incident to or dependent upon that object or business, and to finish whatever he has done. "Qui absentis negotia gerere inchoavit neque enim fortassis alius si is non cepisset voluntatis est enim suscipere mandatum necessitatis consummare" (*Dig. lib. 13, tit. 6*). Story adds that, without some such obligation, every man in the community would be at the mercy of ignorant and officious friends (Story on *Bailments*, 189 *a*). Justinian says that the negotiorum gestor must show that he has satisfied the highest standard of carefulness; for to display such carefulness as he is wont to exercise in his own affairs is not enough, if only a more diligent person could have managed the business better. "Quo casu ad exactissimam diligentiam compellitur reddere rationem; neque sufficet talem diligentiam adhibere, qualem suis rebus adhibere solet, si modo alius diligentior eo commodius administraturus esset negotia" (*Just. Inst. bk. iii. tit. 28, s. 1*). It would not be sufficient for Pothier to exercise the same care in looking after Peter's grapes as he would exercise in the case of his own; and unless he can show that he has satisfied the highest standard of carefulness, Peter will have an action against him for any injury caused by his intermeddling. Where a negotiorum gestor engages in a new business to which the principal is not accustomed, he will always be liable for any injury arising in the course of such business, for it is treated as an improper act—"Culpa est immisceri se rei ad se non pertinenti" (*Dig. lib. 50, tit. 28, s. 1*). Labeo, whose opinion is quoted with approval by Sir William Jones (Jones on *Bailment*, 49), seems to think that where the negotiorum gestor interferes officiously, but from pure kindness, and in a case of apparent necessity, no more than good faith is required of him—"Nam si affectione coactus ne bona mea distrahantur negotiis te meis obtuleris æquissimum esse dolum duntaxat te præstare" (*Dig. lib. 3, tit. 5*). In *Drake v. Shorter* (1803, 4 Esp. 163), which was a case of trover for a boat, it was alleged by the defendant

that a certain vessel, which was in the plaintiff's care, had taken fire, and that the defendant took a boat belonging to the plaintiff, and endeavoured to extinguish the fire, in doing which the boat was lost. The defendant failed to prove that the vessel was in the plaintiff's care, and plaintiff had his verdict; but Lord Ellenborough is reported to have said, that "if the fact was so, it amounted to a defence. What might be a tort under one circumstance might, if done under others, assume a different appearance. As, for example, if the thing for which the action was brought, and which had been lost, was taken to do an act of charity, or to do a kindness to the party who owned it, and without any intention of injuring it, or of converting it to his own use—if under any of these circumstances any misfortune happened to the thing, it could not be deemed an illegal conversion, but as it would be a justification in an action of trespass, it would be a good answer to an action of trover." This ruling has been criticised as going too far, and Mr. Beven in his book on *Negligence* (p. 928 *n.*) seems to think that Lord Ellenborough has not been accurately reported. It may be noticed that the Lord Chief Justice does not refer at all to the question of apparent necessity.

(3) A third person employed by the negotiorum gestor may recover from him the sum which he has contracted to pay for such person's services. On the other hand, if any injury is done by the third person, he must indemnify the negotiorum gestor against the damages which he is obliged to pay. It is evident that a bare negotiorum gestor cannot maintain an action for a bare nonfeasance, for he has suffered no damage.

(4) Livermore thinks that, whether the owner can sue under such circumstances admits of some doubt, and quotes the statement of Mr. Justice Buller in *Marchington v. Vernon* (1787, 1 Bos. & Pul. 101 *n.*), that if one person makes a promise to another for the benefit of a third, that third person can maintain an action on it. This case and also those collected in 3 Bos. & Pul. 149 *n.* can no longer be supported (*Tweddle v. Atkinson*, 1861, 1 B. & S. 393), but at the same time the owner, by ratifying the action of the negotiorum gestor, could put himself in a position to sue the person from whose nonfeasance he has suffered damage.

[*Authorities.*—Moyle, *Justinian*; Story on *Bailment*; Kent's *Commentaries*; Livermore on *Agency*; Beven on *Negligence*, 2nd ed.]

Nem. con. ; Nem. dis.—Of these expressions, the former—an abbreviation of *nemine contradicente*—signifies the unanimous consent of the House of Commons to a vote or resolution; the latter, which is an abbreviation of *nemine dissentiente*, signifies a similar assent of the House of Lords.

Nephews and Nieces.—When in a will or other document reference is made to "nephews and nieces" or either of these terms, there is a legal presumption that the class of kindred so pointed out primarily includes only nephews and nieces in the dictionary sense, that is to say, the sons and daughters of brothers and sisters of the person whose will or writing is under consideration (Mellish, L.J., in *In re Blower's Trusts*, 1871, L. R. 6 Ch. 351; cp. *Wells v. Wells*, 1874, L. R. 18 Eq. 504; *Smith v. Lidiard*, 1857, 3 Kay & J. 252). No distinction is made between children of whole and children of half brothers and sisters, the construction following

the Statute of Distributions and not certain English dictionaries (*Grievès v. Rawley*, 1852, 22 L. J. Ch. 625).

If, however, the context clearly shows that the more enlarged sense which popular language has attached to the terms is intended, the construction will be accordingly, and nephews and nieces by marriage and even great-nephews and great-nieces may be included (*Bowen*, L.J., in *In re Taylor, Cloak v. Hammond*, 1886, L. R. 34 Ch. 255, 259; cp. *Weeds v. Bristow*, 1866, L. R. 2 Eq. 333; *James v. Smith*, 1844, 14 Sim. 214). In such cases the testator or writer is supposed to have made his own dictionary, that is, put his own construction on his language. Thus nephews and nieces on a husband's or wife's side have been included both when there were nephews and nieces on both sides (*In re Gue, Smith v. Gue*, W. N. 1892, pp. 88, 132; *Grant v. Grant*, 1870, L. R. 5 C. P. 380, 727; *Adney v. Greatrex*, 1869, 38 L. J. Ch. 414; *Frogley v. Phillips*, 1860, 30 Beav. 168), and when the testator or writer had no nephews and nieces of his own (*Sherratt v. Mountford*, 1873, L. R. 8 Ch. 928; *Hogg v. Cook*, 1863, 32 Beav. 641). Grand-nephews and grand-nieces have also been included on the same grounds (*Weeds v. Bristow*, *supra*). The context must, however, clearly indicate that the extended signification is meant, otherwise the stricter rule of construction will prevail. Thus, where there was no indication that the terms were used convertibly, nephews and nieces by affinity have been excluded (*Merrill v. Morton*, 1881, L. R. 17 Ch. 382; *Wells v. Wells*, *supra*; *Smith v. Lidiard*, *supra*), as also grand-nephews and grand-nieces (*In re Blower's Trusts*, *supra*; *Thompson v. Robinson*, 1859, 29 L. J. Ch. 280; *Crook v. Whitley*, 1857, 26 L. J. Ch. 350; *Shelley v. Bryer*, 1821, Jac. 207), and a great-grand-nephew has been held not to have been pointed out by the term grand-nephew (*Waring v. Lee*, 1845, 8 Beav. 247). Even illegitimate children have been allowed to come into competition with legitimate children (*In the goods of George Ashton*, [1892] Prob. 83), but in this case it must be shown that the testator so intended, or at all events that a contrary intention could not be imputed to him. Thus the claims of such have frequently been refused (*In re Fish, Ingham v. Rayner*, [1894] 2 Ch. 83; *In re Goodall*, W. N. 1888, p. 69; *In re Hall, Branston v. Weightman*, 1887, 35 Ch. D. 551).

According to the civil law, nephews and nieces are in the third degree of consanguinity, though the canon law places them in the second degree. Thus under the Statute of Distributions, nephews and nieces, uncles and aunts, will all be equally entitled (*Durant v. Prestwood*, 1738, 1 Atk. 454), and if a deceased intestate leave wife, mother, and nephews and nieces of a deceased brother, the latter will share with their grandmother (*Stanley v. Stanley*, 1739, 1 Atk. 455). In some cases they will take *per capita*, in some *per stirpes*, unless, that is, there is a will and the testator has manifested a contrary intention. If the intestate's brothers and sisters are at the time of the decease themselves also dead, the children will take *per capita* (*Bowers v. Littlewood*, 1719, 1 P. Wms. 595), but if some are alive then the children will take *per stirpes* by way of representation and not equally (*Lloyd v. Tench*, 1750, 2 Ves. 215).

Net.—"Net profits are the sum divisible among the partners after discharging or making provision for every outgoing properly chargeable against the period, whether a year or less, for which the profits are calculated" (per Kekewich, J., *Glazier v. Rolls*, 1889, 42 Ch. D. 453). As to "net profits" of a company, *vide Lambert v. Neuchatel Asphalte Co.*, 1882,

51 L. J. Ch. 882; *Dent v. London Tramways Co.*, 1880, 50 L. J. Ch. 190. A reservation of a "net" rent, or a rent "free of all outgoings," imposes upon a tenant the burden of all rates and taxes, except property tax (*vide Barrett v. Bedford*, 1817, 8 T. R. 602; *Parish v. Sleeman*, 1860, 29 L. J. Ch. 96).

"Net annual value" signifies "the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent-charge, if any, and deducting therefrom the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent."

Where an agent bargains for a commission on the "net proceeds," the commission is only payable on the sum which really goes into the pocket of his principal, after all charges, expenses, and bad debts have been deducted (*Caine v. Horsfall*, 1847, 17 L. J. Ex. 25; see also *Bower v. Jones*, 1831, 8 Bing. 65; see *Bennett v. Wormack*, 1828, 7 Barn. & Cress. 628).

Neutralisation of Territory.—See NEUTRALITY.

Neutrality.

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The condition of a State not a party in a dispute between other States: *qui neutrarum partium est*.

I. HISTORY.

The conditions of antiquity did not develop any organised resistance to inter-belligerent operations. There were no essential economic interests of powerful rival nations otherwise indifferent to disputes of their neighbours. Nor was there any balance of power which a number of States had an interest, if need be, in combining to maintain. Weaker States, moreover, hardly dared to speak up for rights which there was neither a public opinion to sanction nor a standing army to enforce.

Thus we read of Gito, the tyrant of Syracuse, who suspended his inclination in the war betwixt the Greeks and Barbarians, keeping a resident ambassador with presents at Delphos, to lie and watch to see which way fortune should incline, and then take occasion to fall in with the victors.

Still the idea of neutrality did exist, as we see from the treaty concluded between the Romans and Jews, described in the First Book of the Maccabees, ch. viii., by which neither party was to give anything to the other's enemy, or "aid them with victuals, weapons, money, or ships," though such a stipulation shows that a treaty was necessary to prevent a third State from

helping a belligerent,—in fact, that neutrality was not otherwise viewed in antiquity as an international obligation.

Nor do the terms found in Roman writers, and afterwards borrowed by publicists who wrote in Latin: *amici, socii, pacati, medii*, convey the idea of neutrality. Grotius uses *medius in bello*, and *extra bellum positus*. "I call *non hostes*," says Bynkershoek, "those who take part with neither party, and who are not bound to either by any alliance." If they are so bound, they are *fœderati*, not simply *amici* (*Quæst. jur. pub.* i. 9).

It was probably first in connection with the Crusades that there were reasons why a systematised usage in respect of neutrality should grow up. We know that the supplying of arms and assistance to the Saracens was placed under the ban of the Church; and, according to Alberic Gentilis, persons taken in the act were "*capientiam fieri servos censemus*." The rise and active intercourse of the maritime republics of the Mediterranean would be another circumstance promoting its development. It was probably owing to these two causes that the *Consolato del mare* (*q.v.*) contains a chapter (273), regulating with a certain minuteness the procedure of capture, acknowledges the right to search neutral vessels, and lays down the well-known rules—

That (1) an enemy's cargo on a friend's vessel is liable to confiscation; and (2) a friend's cargo on an enemy's vessel is not so liable.

These rules became in time more or less universal.

Meanwhile in treaties of peace and amity, clauses were often inserted as to the observance of neutrality similar to that we have mentioned above between the Romans and Jews. Thus in a treaty of 1303 between England and France we read: "*Accorde est que l'un ne receptera ne soustendra ne confortera, ne fera confort, ne ayde aus enemis de l'autre; ne ne souffera qu'ils aient confort secours ne ayde soit de gent d'armes, ou de vitailles ou d'autres choses queles quels soient, de ses terres ne de son poiar*" (Rymer, vol. ii. p. 927). See also the treaty between Henry VIII. and Francis I. of 1515, and the Treaty of Münster between the Emperor and France of 1648.

On the development of maritime commerce and the rise of several great naval States, consequent upon the discovery and colonisation of the American continent, neutrality questions acquired a new importance.

The rivalry of the English and Dutch, and the Spanish wars, gave rise to warm controversies on the right of search. In 1576 England viewed the stoppage of her ships by the Dutch, as belligerents, as an insult to her flag, though a few years later (1588), as a belligerent herself, she found it necessary to insist on a stricter observance of neutral obligations.

A precise regulation of the laws of neutrality, different from the rules of the *Consolato del mare*, was included in the French Ordinance of 1584, which provided that a friend's goods in an enemy's ship, and the ship of a friend having enemy's goods on board, were liable to confiscation. This was re-enacted in the Ordinance of 1681; but by treaties with different Powers, as with Holland in 1646 and the Hansa in 1655, France relaxed these rules in favour of those of the *Consolato*. The clause in which she did so, in the Treaty of Navigation and Commerce of Utrecht, 1713, with England, is interesting. It provided that it should be lawful for the subjects of the Queen of Great Britain and of the Most Christian King to sail with their ships with all manner of liberty and security, no distinction being made as to who were the proprietors of the merchandises laden thereon, from any port to the places of those who were now or should be thereafter at enmity with the Queen of Great Britain or the Most Christian King.

And as it is now stipulated concerning ships and goods, that *free ships shall also give a freedom to goods*, and that everything shall be deemed to be free and exempt which

shall be found on board the ships belonging to the subjects of either of the confederates, although the whole lading or any part thereof should appertain to the enemies of either of their majesties, contraband goods being always excepted (Art. 17).

England on her side, in 1674 (Dec. 11), in agreement with Holland, and in 1787 with France, waived or abated the right of search. In 1740 Prussia disputed without offering actual resistance to it, and in 1762 Holland disputed the right to search vessels under convoy. The facts show until how recently ideas of neutrality remained in a vacillating condition.

In Molloy's *De jure maritimo et navale* (edition of 1688) there is an interesting passage showing the state of feeling on the subject at the close of the seventeenth century.

"Neutrality," he says, "may be of two sorts: the one with alliance with either part; the other without alliance, or so much as the least tie, to the one or other, which is that which may properly be called neutrality.

"The first is governed by the Treaty of Neutrality, the latter by the discretion of the neuter prince, whose carriage ought always to be such as that he may not give the least glimpse of inclining more to one than to another.

"The advantages of neutrality are, that the neuter prince or republic is honoured and respected of both parties; and by the fear of his declaring against one of them, he remains arbitrator of others and master of himself.

"And as a neuter neither purchases friends nor frees himself from enemies, so commonly he proves a prey to the victor; hence it is held more advantage to hazard in a conquest with a companion than to remain in a state wherein he is in all probability of being ruined by the one or the other.

"But princes that are powerful have used generally to preserve a neutrality; for while petty princes and States ruin themselves by war, he fortifies himself with means, and in the end may make himself judge of their differences.

"On the other hand, it has been conceived that republics that are weak, what part soever they take it will be dangerous to them, especially if they are in the midst of two more powerful States than themselves; but experience hath made it appear to the contrary: that neutrality is more beneficial to a weak prince or republic, so that they that are at war be not barbarous or inhumane. For though neutrality does not please either party, yet in effect it wrongs no man; and as he does not serve, so he does not hurt; besides, his declaration is reserved till the issue of the war, by which means he is not obliged, by siding with either party, to gain or lose by the war."

A great advance was made in 1744. France adopted the *Consolato* rule purely and simply, and the practice of neutrality now reached a condition in which generalisation was possible. The term "neutral" took the place of the old one of "friend."

Soon after this (1759), Lee published his analysis of Bynkershoek, Vattel his great book on the law of nations (1758), in which he dealt fully with the rights and duties of neutrals, and Hübner his famous work (1769) on neutrality as an independent subject.

Vattel set out systematically the existing practice; Hübner vindicated the rights of neutrals, contending, with a prophetic vision of what would follow a century later, for the principle that, a neutral ship being assimilated to neutral territory, enemy's goods are covered by the neutral flag.

He also devoted a large part of his book to arguing that the prize Courts of the captors are incompetent to decide on the capture of neutral vessels,

and proposed to substitute for them mixed tribunals, composed of the consul of the neutral and a commissioner of the belligerent State. Will this be the next advance made?

At length, in 1780, neutral nations found an opportunity of asserting their rights against the pretensions of the then great maritime Powers. England was at war with France and Spain. She, in particular, had carried to extreme limits the rights claimed by belligerents. All trade with the enemy was forbidden to the neutral; the theory of contraband of war was beyond reasonable justification extended; paper blockades became habitual (Rivier, ii. p. 372); the rule of 1756, which forbade subjects of a neutral State to carry on in time of war any trade from which they were excluded in time of peace—a provision against the transfer of the coasting trade of a country at war with England to neutral bottoms—these constraints upon neutrals were as vexatious as if they were at war themselves.

On April 3, 1780, a memorial was presented to the States-General by Prince Gallitzin on the part of the Empress of Russia, accompanied by a copy of a declaration which she had made to the belligerent Powers, purporting that she was determined to maintain the free trade and navigation of her subjects, and not to suffer either to be hurt by those Powers; that her definition of the limits of a free trade was founded upon the clearest notions of natural right . . . ; that she invited the States-General to make common cause with her, and had addressed the same invitation to the Courts of Copenhagen, Stockholm, and Lisbon, in order that by their united endeavours a natural system, founded on justice, might be established and legalised in favour of the trade of neutral nations, and serve as a rule for future ages (Beawes, *Lex Mercatoria Rediviva*, 1745, ii.).

The armed neutrality which ensued was the first open declaration of resistance by neutral Powers to the old system of maritime rights of war. By the treaty instituting it, Russia, Sweden, and Denmark proclaimed the principles: (1) That all neutral ships were to navigate freely from port to port, and on the coasts of nations at war; (2) that articles belonging to the subjects of the warring powers were to be free in all neutral vessels, except contraband merchandise; (3) that only certain articles were to be deemed contraband, namely, those which were mentioned in certain clauses of the Russian treaty of commerce with Great Britain; (4) that a port was only to be deemed validly blockaded when the blockade was maintained by such a force that it was dangerous to enter it; (5) that these principles were to serve as rules for determining the legality of captures and prizes.

It is true that the confederated States, and more particularly Russia, sacrificed, at a later date, some of the principles for which they had so strenuously contended. Still the armed neutrality marked a new era in the conduct of maritime war. Neutrals had henceforth to be reckoned with.

The second armed neutrality (1800), marking no advance, but rather the contrary, is only historically interesting.

To the United States falls the merit of the first move to recognise the duties of neutrality. Mr. Hall gives an excellent account of the events which led to the first restraints placed on foreign enlistment. On the outbreak of war in Europe in 1793, a French Minister, M. Genêt, granted commissions to American citizens, who fitted out privateers, and manned them with Americans, to cruise against British trade. Immediate complaints were made by the English Minister, who expressed his "persuasion that the Government of the United States would regard the act of fitting out these privateers in its ports as an insult offered to its sovereignty." Mr. Jefferson thereupon wrote to M. Genêt: "That it is the right of every

nation to prohibit acts of sovereignty from being exercised by any other within its limits, and the duty of a neutral nation to prohibit such as would injure one of the warring Powers; that the granting military commissions within the United States by any other authority than their own is an infringement of their sovereignty, and particularly so when granted to their own citizens to lead them to commit acts contrary to the duties they owe to their country." He wrote further to the American Minister in Paris: "That the right of raising troops being one of the rights of sovereignty, and consequently appertaining exclusively to the nation itself, no foreign person can levy men within its territory without its consent; that if the United States have a right to refuse the permission to arm vessels and raise men within their ports and territories, they are bound by the laws of neutrality to exercise that right, and to prohibit such armaments and enlistments." See *International Law*, p. 615.

The existing law, however, proved inadequate on the trial of one of M. Genêt's privateers (see Wharton's *State Trials*, *Gideon Henfield's* case). Hence the first Foreign Enlistment Act, an enactment for securing the neutrality of American citizens. Great Britain followed the example of the American Republic by adopting a similar measure. See FOREIGN ENLISTMENT.

After the Napoleonic wars there was no occasion to again raise questions of neutral right and duty until the Crimean war, when the two principal maritime Powers were allied against Russia. It was at once seen that though practice had lain dormant, theory and public feeling had stridden forwards, and before the commencement of hostilities it was found necessary to revise and reform some of the neutrality rules. England still adhered to the principle of the *Consolato del mare*, in virtue of which enemy property could be seized under the neutral flag; France, to the provisions of the Treaty of Utrecht, which permitted neutral property to be seized if sailing under the enemy's colours. It was evident that if these two principles had been applied by each Power as they had been in the habit of doing, the commerce and navigation of neutrals would have suffered more than ever; for neither their flag nor their property would have been respected (Kleen, *Neutralité*, p. 41).

The two States allied in a joint operation of war could not, says M. Kleen, risk compromising their unity and harmony, and therefore the chances of success of their combined action, by applying opposing systems as to prize. Unity of operations exacted common rules for capture and confiscation; and as an agreement was not possible except on condition of each ally making sacrifices as regards its own usages, England, on the one hand, renounced her traditional custom of seizing enemy property under a neutral flag, and, on the other hand, France discontinued the seizing of neutral property under the enemy flag. Neutrals were thus simultaneously delivered from two ancient and vexatious customs, owing to the alliance of those who had practised them.

The Declaration of Paris (*q.v.*) finally put the new rules on a permanent footing.

To this Declaration several Powers, and in particular the United States and Spain, have not given their assent, the former standing out for the assimilation of naval to territorial warfare, and the immunity of private property from capture; but in the present war between these two States both have declared their intention to observe it.

There are other questions connected with neutrality upon which there is still disagreement. See CONTRABAND OF WAR.

II. DEFINITION AND SCOPE.

It is almost impossible to give a succinct definition of neutrality which can serve to determine its full scope. Several authors have nevertheless grappled with the difficulty. Thus Hübner says—

Neutrality consists in complete inaction with reference to the war, and in an exact and perfect impartiality, manifested by facts, with regard to belligerents, so far as this impartiality relates to the war and to the direct and immediate means of making it (*De la Saisie des batiments neutres*, vol. i. part 1, ch. ii. s. 1).

Azuni says—

Neutrality is the exact continuation of the peaceful state of a Power which, when a war breaks out between two or more nations, abstains absolutely from taking part in their quarrel (*Droit Maritime de l'Europe*, ch. i. art. 3, s. 1).

Hautefeuille, while thinking it impossible to give an adequate definition of so complex a position as that of neutrality, prefers Hübner's to Azuni's description (*Neutres en temps de guerre maritime*, i. p. 165).

Phillimore, Twiss, and Hall make no effort to condense the subject into a definition.

The objection to the definitions quoted above is that they deal with only one side of neutrality, namely, the duty of the neutral, and omit the duty of the belligerent towards the neutral, which forms just as much a part of the subject.

M. Kleen, the author of the latest work published on neutrality, endeavours in his definition to embrace its two aspects.

"Neutrality," he says, "is the juridical relation in which, as far as possible, a State at peace is left untouched by the hostilities between the belligerent States, and itself abstains from all participation in or interference with their quarrel, with strict impartiality towards both" (*La Neutralité*, i. p. 73).

Viewed in this twofold aspect of both rights and duties, neutrality is the general position of States not at war in relation to other States which are at war. Even this definition is incomplete, the words "as far as possible" covering much that is thus left undefined, and we think that all the aspects of neutrality can only be covered by some such subdivision as here follows:—

1. Absolute duty of a neutral State to abstain in its corporate capacity from all acts which may help the one belligerent to the disadvantage of the other.
2. Relative duty of a neutral State as regards prevention of its subjects from helping either belligerent.
3. Contingent duty of a neutral State to grant impartially to one and the other belligerent any rights, advantages, or privileges which, according to the usages recognised among nations, are not considered as an intervention in the struggle.
4. Rights of each belligerent State against the subjects and citizens and their property of each non-belligerent State which, by the usage of nations, the one is entitled to enforce and the other bound to suffer during the continuance of war.

We shall follow this subdivision in our treatment of the subject.

III. ABSOLUTE DUTIES OF NEUTRAL STATES.

It is the duty of the neutral State in its corporate capacity to take no side in a war between two Powers with which it is in amity. It must, therefore, abstain from supplying either belligerent with troops, arms, ships, munitions of war, money, or anything which may aid either belligerent in its operations of war. This applies whether the war be just or unjust, and to all persons in a responsible or representative position in the service or employment of the neutral State. (See art. 454 of the Queen's Regulations and Admiralty Instructions.)

The same applies, within the scope of their functions and even in their individual capacity, to sovereigns and diplomatic and consular agents. Thus a gift of money by a neutral sovereign to his daughter, Queen Regent of a belligerent State, might be considered as a breach of neutrality.

For private loans to and commercial transactions with belligerents, see *infra*.

Diplomatic intercourse and negotiations upon matters which, though of advantage to either belligerent, do not assist him in the prosecution of the war, are unaffected by its existence. Thus there would be no ground of objection in principle to the conclusion during the war of an ordinary treaty of commerce between a neutral and a belligerent State.

IV. RELATIVE DUTIES OF NEUTRAL STATES.

(a) *Prevention of Breaches of Neutrality by Persons within the Neutral Jurisdiction—Foreign Enlistment—Neutral Subjects on Belligerent Territory.*—The duty of a State as such to forbear from committing any act which might be of assistance to either belligerent, cannot in reason be equally absolute as regards the persons within its jurisdiction. These persons are nevertheless bound to observe the same neutrality as the neutral State itself, and some kind of an obligation exists to repair the damage done to the belligerent through infringements committed by them. The difficulties of giving effect to this obligation were so great, that the practice of leaving it to the belligerent himself to insure by visit and search, capture and confiscation, abstention by the subjects of neutral States, was long the only course of requital allowed by the law of nations to belligerents.

In more recent times, with the development of means of communication, it has become possible for States to exercise a more definite control over the acts of their subjects and citizens, and the responsibility of the neutral has correspondingly increased.

A reasonable description of the present position of States as regards their responsibility for acts of those within their jurisdiction would therefore be that a neutral Government is bound to exercise such diligence as is consistent with its institutions, to prevent its subjects and others within its jurisdiction from making its territory a base for belligerent operations.

It would be contrary to the principle of the independence of States to seek to hold a State responsible for acts of infringement of neutrality by those within its jurisdiction which it does not possess a machinery to repress. Several States, as a fact, have no enactments which specifically punish infringements of neutrality; in their case it is left to the belligerent himself to enforce such remedy as the law of nations permits. Other States treat certain violations of neutrality according to their consequences in causing damage or difficulties to themselves. This is the case with France, as to the clauses of whose declaration of neutrality, see Louis, *Neutralité, Journ. de Droit Inter. Priv.* 1877, p. 286; Clunet, *Gaulois*, April 25, 1898.

The grounds of the decision in the *Alabama* case cannot be taken as showing any change in international law, inasmuch as the Court of Arbitration was bound by the principle laid down in the Treaty of Washington as to "due diligence." To meet the requirements of this new principle, the British Parliament has passed enactments of a more far-reaching character than international law can be said as yet to require. By an Act to regulate the conduct of Her Majesty's subjects during the existence of hostilities between foreign States with which Her Majesty is at peace, enlistment, shipbuilding, and expeditions undertaken by any person within British jurisdiction to assist a belligerent are punishable, as substantive

offences, by fines and imprisonment (33 & 34 Vict. c. 90, 1870). See FOREIGN ENLISTMENT.

Neglect of a State to enforce the laws it possesses, to the extent of the vigilance consistent with its institutions, may entail responsibility for the consequences of such neglect, but the absence of reciprocity would be a reasonable answer to a claim by a State whose laws were less stringent.

The relations between Great Britain and the United States of America, in particular, are regulated by the rules laid down in the Treaty of Washington of May 8, 1871, which the high contracting parties agreed to observe as between themselves in future.

They have therefore been reproduced as the basis of the proclamation of neutrality in the present war (see *infra*).

Under them the neutral Government is bound to use "due diligence," where it has "reasonable ground" to believe that any acts have a belligerent character, in "preventing" them. The acts which it is to prevent are as follows:—

- (1) Fitting out, arming, or equipping any vessel;
- (2) The departure from its jurisdiction of any vessel having been specially adapted in whole or in part within such jurisdiction to warlike uses;
- (3) The making use by a belligerent of its ports or waters as the base of naval operations against the other; or
- (4) for the purpose of the renewal or augmenting of military supplies or arms; or
- (5) the recruitment of men.

The contracting States undertook to bring the rules to the knowledge of other maritime Powers, and to invite them to accede thereto (Art. vi.), a step which, it seems, has never been taken (Macdonell, *Nineteenth Century*, May 1898). Nor are the rules likely to find favour among other States, except as part of a general scheme for the regulation of the position of neutrals for their benefit.

Rules of neutrality apply to all persons within the jurisdiction of the neutral State, whether subjects of the neutral Power or not. This is a consequence of the territoriality of States: all persons within the boundaries of the State must respect its laws, and are subject to the ordinary penalties provided by them for cases of infringement.

In like manner, the subjects of neutral States on the territory of a belligerent State can claim no immunity from its ordinary laws. It may even be doubted whether, in the absence of a treaty, subjects of a neutral State in time of war are entitled to exemption from military service in defence of a belligerent attack.

In like manner, again, inhabitants called upon for requisitions, who are subjects of a neutral State, are liable in the same way as natives. They follow the fortune of the country in which they are established. In 1870 notice was given in France that

English subjects having property in France have no right to any special protection for such property, or to be exempt from military contributions to which they may be subjected together with the rest of the inhabitants at the place either of their residence or of the situation of their property; and, furthermore, they have no right, in justice, to complain to the French authorities because their property has been destroyed by an invading army

(Calvo, vol. iv. s. 2200; Bonfils, 1217; Rivier, ii. p. 325).

(b) *Enforcement of Respect for Neutral Territory*.—The passage of belligerent forces through neutral territory, whether by permission of the neutral State or against its will, is a distinct infringement of neutrality.

In this respect international law has imposed a new duty upon neutrals since the time of Vattel, who held that a belligerent had no ground of complaint if the neutral granted passage to the enemy's troops across his territory, especially when he, the neutral, would be obliged to support his refusal with the sword; for, says he, "no sovereign can require that I should take up arms in his favour unless thereunto by treaty bound" (Vattel, s. 127).

To-day, not only are belligerents bound to respect the territory of neutrals, but the neutral is bound to insure respect for it by belligerents. Thus during the Franco-German war of 1870-71, Belgium and Switzerland as immediate neighbours of the scene of war were obliged to keep large military forces on their frontiers to prevent the use of their territory by either belligerent. International law does not, however, forbid the neutral to receive isolated fugitives or even armies of a belligerent, provided they are disarmed and proper measures are taken to prevent their taking any further part in the war.

In 1871 (Feb. 1), when the entire Eastern army of France passed into Switzerland, a convention was concluded at Les Verrières between the Swiss and French generals, under which the fugitive army surrendered their arms, equipments, and munitions to the neutral State, to be retained by the latter until the restoration of peace and final settlement of the expenses incurred by Switzerland. The French army was thus detained till the preliminaries of peace had been signed (March 13-21, 1871). The expenses amounted to eleven millions of francs (Rivier, ii. 397).

As regards the transport over neutral territory of wounded soldiers, the neutral State must be guided primarily by its duty not to assist either belligerent to the detriment of the other. This may even prevail against considerations of humanity, for instance, where the transport of the wounded beyond the area of war operations would relieve the rear of belligerent forces. The Belgian Government had to take some such conditions into account when, after the surrender of Metz, Germany wished to transport the wounded over Belgian territory. On France protesting, Belgium refused. There does not appear to have been the same objection to the transit through Luxemburg, where it was granted. Great Britain was consulted by Belgium as to the proper course to follow, and her refusal seems to have been due to British counsel (Rivier, ii. 399).

The ports of a nation are a part of its territory. Territorial waters (*q.v.*) are assimilated to the territory, except that the ships of all nations have an innocent right of passage through them. This right of innocent passage is possessed by all, including belligerent vessels. Hostilities within territorial waters are an infringement of the neutrality of the adjacent State.

The neutral State is bound to insure respect for its ports, that is to say, it must prevent hostilities being carried into waters within its dominions. This was brought out in the case of *The General Armstrong*, an American privateer, which, during the war between the United States and Great Britain in 1814, put into a Portuguese harbour in the Azores. From there it fired upon some passing boats from a British warship at anchor in the same port, killing several of the men on board. The British warship attacked the American vessel. The United States made a claim against Portugal for a breach of neutrality. The matter was not settled till, by the Treaty of Washington of February 26, 1851, it was referred to the arbitration of Louis Napoleon, President of the French Republic. He decided in favour of Portugal.

It is manifestly impossible to expect from a neutral State the same

vigilance in its territorial waters as in its territory proper, though it is its duty to do what it reasonably can to prevent hostilities within them.

The following rules to prevent as far as possible the use of harbours, ports, coasts, and waters within Her Majesty's territorial jurisdiction in aid of the warlike purposes of either belligerent, were issued by the British Government, April 23, 1898, in connection with the present war between the United States and Spain:—

Rule 1. During the continuance of the present state of war, all ships of war of either belligerent are prohibited from making use of any port or roadstead in the United Kingdom, the Isle of Man, or the Channel Islands, or in any of Her Majesty's colonies or foreign possessions or dependencies, or of any waters subject to the territorial jurisdiction of the British Crown, as a station or place of resort for any warlike purpose, or for the purpose of obtaining any facilities for warlike equipment; and no ship of war of either belligerent shall hereafter be permitted to leave any such port, roadstead, or waters from which any vessel of the other belligerent (whether the same shall be a ship of war or a merchant ship) shall have previously departed, until after the expiration of at least twenty-four hours from the departure of such last-mentioned vessel beyond the territorial jurisdiction of Her Majesty.

Rule 2. If there is now in any such port, roadstead, or waters subject to the territorial jurisdiction of the British Crown, any ship of war of either belligerent, such ship of war shall leave such port, roadstead, or waters within such time not less than twenty-four hours as shall be reasonable, having regard to all the circumstances and the condition of such ship as to repairs, provisions, or things necessary for the subsistence of her crew; and if after the date hereof any ship of war of either belligerent shall enter any such port, roadstead, or waters subject to the territorial jurisdiction of the British Crown, such ship shall depart and put to sea within twenty-four hours after her entrance into any such port, roadstead, or waters, except in case of stress of weather, or of her requiring provisions or things necessary for the subsistence of her crew, or repairs; in either of which cases the authorities of the port, or of the nearest port (as the case may be), shall require her to put to sea as soon as possible after the expiration of such period of twenty-four hours, without permitting her to take in supplies beyond what may be necessary for her immediate use; and no such vessel which may have been allowed to remain within British waters for the purpose of repair shall continue in any such port, roadstead, or waters for a longer period than twenty-four hours after her necessary repairs shall have been completed. Provided, nevertheless, that in all cases in which there shall be any vessels (whether ships of war or merchant ships) of both the said belligerent parties in the same port, roadstead, or waters within the territorial jurisdiction of Her Majesty, there shall be an interval of not less than twenty-four hours between the departure therefrom of any such vessel (whether a ship of war or merchant ship) of the one belligerent, and the subsequent departure therefrom of any ship of war of the other belligerent; and the time hereby limited for the departure of such ships of war respectively shall always, in case of necessity, be extended so far as may be requisite for giving effect to this proviso, but no further or otherwise.

Rule 3. No ship of war of either belligerent shall hereafter be permitted, while in any such port, roadstead, or waters subject to the territorial jurisdiction of Her Majesty, to take in any supplies, except provisions and such other things as may be requisite for the subsistence of her crew, and except so much coal only as may be sufficient to carry such vessel to the nearest port of her own country, or to some nearer destination, and no coal shall again be supplied to any such ship of war in the same or any other port, roadstead, or waters subject to the territorial jurisdiction of Her Majesty, without special permission, until after the expiration of three months from the time when such coal may have been last supplied to her within British waters as aforesaid.

Rule 4. Armed ships of either belligerent are interdicted from carrying prizes made by them into the ports, harbours, roadsteads, or waters of the United Kingdom, the Isle of Man, the Channel Islands, or any of Her Majesty's colonies or possessions abroad.

The "twenty-four hours rule," to which the first and second of the above rules relate, is not applied with the same rigour by all States.

The French proclamation of neutrality confines its warning to the following:—

The Government further declares that no warship of either belligerent will be permitted to enter and remain with its prizes in any of the ports or roads of France, or its

colonies and protected countries, for a longer period than twenty-four hours, except in case of stress of weather (*relâche forcée*) or justifiable detention.

Conversely, the following are the rules provided by the Queen's Regulations and Admiralty Instructions for the government of Her Majesty's Ships when as belligerent vessels they visit the ports of a neutral State:—

592. Subject to any limit which the neutral authorities may place upon the number of belligerent cruisers to be admitted into any one of their ports at the same time, the captain by the comity of nations may enter a neutral port with his ship for the purpose of taking shelter from the enemy, or from the weather, or of obtaining provisions or repairs that may be pressingly necessary.

593. He is bound to submit to any regulations which the local authorities may make respecting the place of anchorage, the limitation of the length of stay in the port, the interval to elapse after a hostile cruiser has left the port before his ship may leave in pursuit, etc.

594. He must abstain from any acts of hostility towards the subjects, cruisers, vessels, or other property of the enemy which he may find in the neutral port.

595. He must also abstain from increasing the number of his guns, from procuring military stores, and from augmenting his crew even by the enrolment of British subjects.

Nor may the commander of a British warship take a capture into a neutral port against the will of the local authorities (see Holland, *Manual of Naval Prize Law*, 1888, s. 299).

V. DUTY OF IMPARTIALITY.

While certain acts as between a neutral and a belligerent State are forbidden absolutely, and the neutral State, according to circumstances, is under a relative obligation to prevent the commission by those within its jurisdiction of certain other acts, there is a third class of acts which the usage of nations allows, on condition that both belligerents be permitted to benefit by them to the same extent.

Subject to the right of a belligerent to capture and confiscate contraband of war (*q.v.*), no purely mercantile act is a violation of neutrality. During the Franco-German war there was correspondence between the Prussian Ambassador in London and Earl Granville as to exports of arms and munitions of war by British merchants to France; and the question of their legality was the subject of an interesting interchange of opinions between the two countries.

Earl Granville asserted that the export of arms to a belligerent country by private citizens of a neutral one was not forbidden by the law of nations, and recalled that Prussia herself during the Crimean war had done nothing to prohibit the copious supply of arms and contraband of war to Russia by the States of the Zollverein—in fact, that the Prussian Government, when this state of things was brought to its notice, affirmed that it could not interfere with the course of trade. Earl Granville further pointed out the difficulty of making any alteration of this rule of free export, inasmuch as any prohibition could easily be evaded by giving a neutral destination to the prohibited articles. The suggestion of exacting a bond from shippers would be “most onerous to the mercantile community, would be easily evaded, and at the best would be no security against ultimate destination” (*Franco-German War*, No. 1, 1871, p. 80).

Similar representations were made to the United States Government as to shipments of men, arms, and ammunition to France by *The Lafayette*. As regards the arms and ammunition, the United States Government contended they were articles of legitimate commerce with which the United States could not interfere, although the vessel might run the risk of

being detained by the cruisers of North Germany on her voyage to France (*ibid.*, p. 128).

The German contention in these controversies was that it was incompatible with strict neutrality that French agents should be permitted to buy up in the neutral country, under the eyes and with the cognisance of the neutral Government, "many thousands of breechloaders, revolvers, and pistols, with the requisite ammunition, in order to arm therewith the French people, and make the formation of fresh army corps possible after the regular armies of France have been defeated and surrounded" (*ibid.*, p. 131).

In the present state of international usage, there is no absolute rule for the guidance of the neutral State as regards trade in arms and munitions of war between private citizens within its jurisdiction and the belligerent State. It is quite conceivable that this trade might take such proportions, owing to circumstances favourable to one belligerent as against the other, that the impartiality would remain merely one of principle.

The same remarks apply also to loans of money raised within the jurisdiction of a neutral State. It is quite conceivable that the greater credit of one of the belligerent States would enable it more freely than the other to procure money in neutral countries for the purposes of war. The general practice of States, however, has shown itself unfavourable to imposing any restriction which might in turn be set up against a complaining State. Neutral States did not prevent the issue on their territory of the Russian war loan of 1876-77. In the recent war between China and Japan, no opposition was made by Japan to the raising of a Chinese loan in London. In 1870 both France and Germany made free use of the English money market. Protests have nevertheless been heard. Thus in 1854 France expressed herself strongly on the loans raised by Russia at Berlin, the Hague, and Hamburg.

As a matter of municipal law, that is to say, how far the English Courts will recognise as valid transactions arising out of loans to a belligerent or insurgent Government, a careful examination of the authorities will be found in Pitt Cobbett's *Leading Cases* (p. 247). The general conclusion to be drawn from them is, that loans made to insurgent forces may not be upheld by our Courts as legal engagements. "Beyond this point they are neither sufficiently explicit nor direct to warrant our extending their principle to commercial loans on behalf of a fully-recognised belligerent Power" (*ibid.*, p. 249).

The arguments against prohibition of the export of arms and munitions of war by private merchants apply of course with still greater force to articles which may or may not, according to circumstances, be considered contraband of war. Thus coal may or may not be contraband. Its character is dependent upon its destination. In reply to an inquiry on the subject, the Foreign Office has declared that—

Coal is an article not *per se* contraband of war, but if destined for warlike, as opposed to industrial, use, it may become contraband. Whether in any particular case coal is or is not contraband of war is a matter *primâ facie* for the determination of the Prize Court of the captor's nationality, and so long as such decision, when given, does not conflict with well-established principles of international law, Her Majesty's Government will not be prepared to take exception thereto

(Letter of Hon. F. Villiers, Assistant Under-Secretary at the Foreign Office to the Newport Chamber of Commerce, May 5, 1898).

As regards the historic "rule of 1756"—

It was held, down to the early years of the present century, that neutral vessels were liable to detention for engaging in a trade which in time of peace was closed to vessels other than those of the enemy State. The colonial and coasting trades at one

time customarily closed to foreign vessels are, however, now so generally open to the ships of all nations, that the rule in question has perhaps lost its practical importance. Its operation would also be interfered with by the second clause in the Declaration of Paris of 1856, to the effect that the neutral flag covers enemy's goods with the exception of contraband of war. In any case the rule is not to be enforced by commanders of British cruisers without special instructions

(Holland, *Manual*, p. 41).

VI. RIGHTS OF BELLIGERENTS AFFECTING SUBJECTS OF NEUTRAL STATES.

(a) *Visit and Search*.—Neutral private or merchant vessels are bound to submit to the exercise of this belligerent right. As between the Powers bound by the Declaration of Paris (*q.v.*), privateering (*q.v.*) is abolished. Several Powers, including the United States and Spain, however, are not parties to it, and are still entitled to grant letters of marque. Neutral merchant ships are therefore still exposed to visit and search by privateers commissioned by these Powers. See VISIT AND SEARCH.

(b) *Blockade* (*q.v.*).

(c) *Capture and Confiscation of Neutral Private or Merchant Vessels and Goods*.—See PRIZE.

VII. PROCLAMATIONS OF NEUTRALITY.

A proclamation of neutrality is binding as between the State issuing it and its subjects or citizens, so far as its laws sanction it. As between States, it may be used against the State issuing it as an acknowledgment of liability. On the other hand, it serves as notice to belligerents on any doubtful point it may mention. Great Britain issues a very full proclamation, France a short one, and Germany and Austria none at all. There are good arguments in favour of all three systems. The British view is that all persons within the British jurisdiction should at once and as fully as possible be informed of any exceptional duties and liabilities with which they cannot be familiar.

The last British proclamation issued will be found in the *London Gazette*, Extraordinary, of April 26, 1898.

VIII. NEUTRALISATION OF TERRITORY.

Treaties have been concluded from time to time by which the contracting States have agreed to consider certain territories as neutral. Such States are supposed to be guaranteed against dismemberment by the contracting States, and they are debarred by their neutrality from taking part in any hostilities except for the purpose of resisting attempted violations of their territory.

Switzerland, Belgium, Luxemburg, and the independent State of the Congo, are instances of Neutralised Territory (see a full exposition of the subject in Rivier, i. 108).

[*Authorities*.—Hall, *The Rights and Duties of Neutrals*, London, 1874; Kleen, *Lois et Usages de la Neutralité*, Paris, 1898; Gessner, *Le Droit des Neutres sur Mer*, 2nd ed., Berlin, 1876; Hautefeuille, *Droits et Devoirs des Nations Neutres en Temps de Guerre Maritime*, 3rd ed., Paris, 1868; Godchot, *Les Neutres*, Algiers, 1891; Bergbohm, *Die Bewaffnete Neutralität*, Berlin, 1884; Ward, *Treatise on the Relative Rights and Duties of Belligerent and Neutral Powers in Maritime Affairs*, London, 1801, reprinted 1875; Vattel, *Law of Nations*, London, 1795, ch. vii.; Hosack, *The Rights of British and Neutral Commerce*, London, 1854; Katchenowsky, *Prize Law: particularly with reference to the Duties and Obligations of Belligerents and Neutrals*,

trans. Pratt, London, 1867; Ortolan, *Règles Internationales et Diplomatie de la Mer*, 4th ed., Paris, 1864; Phillimore, *International Law*, vol. iii. 2nd ed., London, 1873; Twiss, *Law of Nations in time of War*, 2nd ed., London, 1875, chs. xi. and xii.; Wharton, *Digest of the International Law of the United States*, ch. xxi., Washington, 1886; Holtzendorff's *Handbuch des Völkerrechts*, Hamburg, 1889, vol. iv. (Geffcken, *Die Neutralität*, pp. 605 *et seq.*); Perels, *Manuel de Droit Maritime*, trad. Arendt, Paris, 1884, pp. 237 *et seq.*; Woolsey, *Introduction to the Study of International Law*, 5th ed., London, 1879, Part ii. ch. ii.; Holland, *A Manual of Naval Prize Law*, London, 1888; Rivier, *Principes du Droit des Gens*, Paris, 1896, ss. 68 and 69; Guelle, *Précis des Lois de la Guerre*, Paris, 1884, Appendix; Holland, *Jurisprudence*, p. 357, 8th ed., Oxford, 1896; Pitt Cobbett, *Leading Cases and Opinions on International Law*, 2nd ed., London, 1892; Risley, *The Law of War*, London, 1898, Part iii.]

Ne varietur, “that it be not changed,” a phrase used by translators and notaries on the Continent for the purpose of identifying an original document of which they have delivered a certified translation or copy.

Never indebted.—See NUNQUAM INDEBITATUS.

New Assignment.—See PLEADING, *Before the Judicature Acts*.

New Brunswick.—See CANADA.

New Building.—By the London Building Act, 1894, 57 & 58 Vict. c. 213, s. 5 (6), this term is defined to mean and include—(a) any building erected after 1st January 1895; (b) any building which has been taken down for more than one-half of its cubical extent, and re-erected or commenced to be re-erected wholly or partially on the same site, after 1st January 1895; and (c) any space between walls and buildings which is roofed or commenced to be roofed after 1st January 1895. All such buildings must comply with the provisions of that Act. See especially secs. 13, 14, 15, 16, 17, 21, 22, 23, 26, 47, 53 *et seq.*, 82, 170, 171, 200 (offences), and the first schedule as well as the by-laws of 1894. The question as to whether a structure is a “new building” or not is also of importance in determining what is a “new street” within sec. 8 of the before-mentioned Act, for a new street is not only one constructed for the first time, but an old way now first lined with houses (*Robinson v. Barton*, 1883, 21 Ch. D. 621; 8 App. Cas. 798). New buildings outside the London area come within the Public Health Act, 1875, 38 & 39 Vict. c. 55, sec. 157 of which provides that every urban authority may make by-laws with respect to, *inter alia*, the construction of new streets and the sewerage thereof, and with respect to the structure of walls, foundations, roofs, and chimneys of new buildings, for securing stability and the prevention of fires, and for purposes of health, the ventilation of buildings, drainage of buildings, and closing of buildings unfit for habitation, with the exception of railway buildings used under any Act of Parliament. Other statutes of importance in respect to new buildings in the London district are: the Metropolis

Management Act, 1855, 18 & 19 Vict. c. 120; the Metropolis Management Acts Amendment Act, 1862, 25 & 26 Vict. c. 102; the Metropolis Management and Building Acts Amendment Act, 1878, 41 & 42 Vict. c. 32; and the Metropolis Management Amendment Act, 1890, 53 & 54 Vict. c. 66; and to new buildings in the provinces are: the Public Health (Buildings in Streets) Act 1888, 51 & 52 Vict. c. 52, and the Public Health Acts Amendment Act, 1890, 53 & 54 Vict. c. 59. Sec. 25 of the last-mentioned Act makes it unlawful to erect a new building on ground filled up with offensive matter, under a penalty of £5, or a daily mulct of 40 shillings; and see secs. 33 and 34 as to buildings intended for dwelling-houses, but described otherwise in the plans.

Whether any structure is a building or not within the Acts, is in every case a question of fact (*Lavy v. London County Council*, [1895] 1 Q. B. 915, and 2 Q. B. 577; *Leicester Corporation v. Brown*, 1893, 5 R. 35; *Barlow v. St. Mary Abbot's, Kensington*, 1886, 27 Ch. D. 362, and 11 App. Cas. 257). Consequently even a wall may be a building, according to the purposes for which it is to be used (*Lavy v. London County Council, supra*); and a wooden structure for advertising purposes, fixed to the ground by four posts and roofed over, has been held capable of being a building within sec. 3 of the Public Health (Buildings in Streets) Act, 1888 (*Leicester Corporation v. Brown, supra*). A stable also was held to be a new building within the Local Government Act, 1858, 21 & 22 Vict. c. 98, repealed by the Public Health Act, 1875, s. 343 (*Hobbs v. Dance*, 1873, L. R. 9 C. P. 30). But temporary seating erected in a completed structure is not a structure within secs. 78 and 145 of the London Building Act, 1894 (*Venner v. M'Donnell*, [1897] 1 Q. B. 421); and a wooden erection of a moveable character, intended for sale, and on sale to be removed, need not have the licence of the London County Council under sec. 13 of the Metropolis Management and Building Acts Amendment Act, 1882 (*London County Council v. Humphreys*, [1894] 2 Q. B. 755). On the other hand, though what is already put up is not a "building, structure, or erection" within sec. 75 of the Metropolis Management Act, 1862, yet if it is subsequently completed, and infringe the Act by being in advance of the building line subsequently determined, it will be liable to demolition (*Wendon v. London County Council*, [1894] 1 Q. B. 812; cp. *Nathan v. Metropolitan Board of Works*, [1894] 1 Q. B. 230 n.). But a mere alteration, as the removal of a portion of the front wall, to refit as a shop, will not have that effect (*A.-G. v. Hatch*, [1893] 3 Ch. 36). If, however, the house is once pulled down, the re-erection is new (*Worley v. Vestry of St. Mary Abbot's, Kensington*, [1892] 2 Ch. 404; but see London Building Act, 1894, s. 22 (2)); and if a building is demolished, and the owner shows an intention to abandon the actual site, it becomes vacant land within sec. 75 of the Metropolis Management Act, 1862, and any curtilages of the old building left, cease to belong to it (*London County Council v. Pryor*, [1896] 1 Q. B. 465). Even when the new structure occupies the actual old site, and is to be occupied with adjoining premises, it has been held to be a new building within sec. 10 of the Metropolis Management Act, 1855 (*Holland v. Wallen*, 1894, 10 R. 583), unless the whole premises properly constitute one building only (*Shiel v. Sunderland*, 1861, L. J. M. C. 215).

The discretion of the local authority to refuse plans of new buildings is absolute if *bona fide* and reasonably exercised under reasonable by-laws. If not so exercised, a mandamus will lie (*Smith v. Chorley District Council*, [1897] 1 Q. B. 678; *R. v. Tynemouth Rural District Council*, [1896] 2 Q. B. 451). As to what may be unreasonable, see *Cook v. Hainsworth*, [1896] 2 Q. B. 85 (as to a by-law), and *Crow v. Redhouse*, 1895, 59 J. P. 663).

New Combination.—See PATENTS.

New Forest was afforested by William the Conqueror, and is one of the three Royal forests which have not been disafforested. It is situate in Hampshire, and contains within its boundaries about 92,000 acres, of which about 27,000 acres are the property of private owners, about 2000 acres are the absolute property of the Crown, and the remaining 63,000 acres form the forest proper, the soil and freehold of which belong to the Crown, whose forestal rights extend over certain portions of the 27,000 acres belonging to private owners.

The primary object of a forest was that of providing for the king's diversion and sport (see FOREST, LAW OF THE), and the timber therein was subservient to that object, and was regarded almost solely from the standpoint of the game; as covert and food for the beasts and fowls of the forest. But with the growth of England as a naval Power there arose the necessity of providing timber for the navy; and thus it came about that the timber in the Crown forests came to be regarded as existing for a purpose entirely different from its original one, namely, for building the king's ships, rather than for providing shelter and food for his deer.

It became evident that the older methods of trusting to the renewal of the woods by natural regeneration, or even by incoppicing, would not provide a supply of timber sufficient for the navy, and we meet with a series of special Acts whose principal object was to insure an adequate supply of navy timber from the Royal forests.

The special Acts relating to the New Forest begin with 9 & 10 Will. III. c. 36, under which the Crown was authorised to enclose and plant 6000 acres. The land for enclosure was to be set out by Commissioners appointed for the purpose by the Crown, and whilst enclosed such lands were to be free from all rights of common (see also 39 & 40 Geo. III. c. 86, and 48 Geo. III. c. 72).

In 1851 an Act called "The Deer Removal Act" (14 & 15 Vict. c. 76) was passed, under which the Crown gave up its right to keep deer in the forest, and, by way of compensation, Her Majesty was authorised to enclose 10,000 acres, in addition to the 6000 acres just mentioned. It was also provided, as in the earlier Acts, that when the plantations, or any part thereof, had become past danger of browsing of cattle or other prejudice, they were to be thrown open, and a similar quantity of waste land was to be enclosed and planted.

The management of the New Forest is vested in the Commissioners of Woods by 10 Geo. IV. c. 50, and the general powers of leasing contained in that Act apply to such lands in the forest the soil and freehold whereof is vested in Her Majesty, discharged of all common and other rights of the subject, and not being land for the time being enclosed under the authority of any Act or Acts for the growth of timber (see CROWN, LAND REVENUES OF).

Commonable Rights.—These rights, in the New Forest, now rest upon and are regulated by the "Register of Decisions" by the Commissioners acting under 17 & 18 Vict. c. 49. This register sets out the names of the persons thus entitled to such rights, the particular rights to which they are entitled and the dues payable therefor, and the lands in respect of which such rights are exercisable.

The Commissioners declared that the right of common of pasture

was not exercisable during the fence month (from 20th June to 20th July), or during the winter heyning (from 22nd November to 4th May).

They further declared that there was no common of pasture for sheep except where expressly mentioned; and they defined and regulated the rights of common of mast, of turbary, of fuel and fuelwood, and of the taking of marl.

New Forest Act of 1877.—This Act was the outcome of the Report of the Select Committee of 1875. It restricted the right of enclosure to such lands as were or had at any time been enclosed by virtue of a commission under the Acts 9 & 10 Will. III. c. 36; 48 Geo. III. c. 72; and 14 & 15 Vict. c. 76; but within this limited area the Crown is entitled to keep 16,000 acres under enclosure, and may throw out or lay open, and re-enclose or replant, any part of such area, provided that the total quantity enclosed does not at any one time exceed 16,000 acres.

In consideration of a payment to Her Majesty by the verderers on behalf of the commoners of 20s. a year, the right of common of pasture may be exercised during the fence month and winter heyning.

The power of sale given by 10 Geo. IV. c. 50, s. 98, in regard to waste land, is abrogated, but the Commissioners of Woods may sell parcels of waste land which are wholly or in parts surrounded by or intermixed with lands not the property of the Crown, on condition that the purchase-money is laid out in purchasing and adding to the forest other land, and such a sale is not to be complete until the purchase-money has been so invested and the other land added to the forest.

In the event of the forest being disafforested, and separate allotments being made to the Crown and to the commoners, the respective rights are to be valued as if the Act had not been passed.

The constitution of the Court of Verderers is amended. There is to be one official verderer appointed by Her Majesty, and six verderers elected, as provided in the Act.

The powers of the verderers are enumerated in sec. 23. They are to hold Courts of swainmote for administrative and judicial business. Every verderer is to have the powers and jurisdiction as if he were a justice of the peace; and the Court of swainmote when transacting judicial business is to be deemed a Court of petty sessions. An appeal lies from the Court of swainmote to Quarter Sessions, but no order or conviction of the Court of swainmote may be removed by *certiorari* or otherwise, but this is not to prevent the removal of a special case stated for the opinion of a superior Court.

By the New Forest Amendment Act, 1879 (c. 194, Local), the verderers are empowered to allow the cattle of strangers to depasture in the forest, and to take dues therefor.

See also FOREST, LAW OF THE.

Newfoundland—An island off the coast of North America, discovered by John Cabot in 1497. The English and French both established stations; at the Peace of Utrecht in 1713, the sovereignty of the whole island was ceded to Great Britain, certain rights being granted to French fishermen, the extent of which is still in question between the two Governments. Provision was made by proclamation, dated the 26th July 1832, for the establishment of a Legislature; and responsible government was introduced in 1855. The Governor is assisted by an Executive Council; there is a Legislative Council (not to exceed fifteen members), and

a House of Assembly of thirty-six elected members. The Supreme Court consists of the Chief Justice and two judges; there is an appeal to the Queen in Council; for conditions of appeal, see PRIVY COUNCIL. The laws of Newfoundland are English in their origin.

[*Authorities*.—Colonial Office List; Hertslet's *Treaties*; Newfoundland Statutes; Cases in the Supreme Court, Newfoundland; Reeves, *Government of Newfoundland* (published in 1793).]

Newgate Prison.—The New Gate of the city of London, erected *temp.* Hen. I., was used as a prison as early as 1188. It was rebuilt as a prison by Sir Richard Whittington, and used as the common gaol for the city of London and county of Middlesex. In 1357 the Lord Mayor was named as a commissioner for the delivery of the gaol, and he so continued as a justice of the CENTRAL CRIMINAL COURT. The ancient prison continued without substantial change till 1770, when its reconstruction was begun; but in 1780 the whole of the old prison was destroyed during the Gordon Riots, and the present prison was completed in 1783 on the plans of 1770. It was then that the practice of execution at Tyburn ceased, and executions of persons sentenced to death at the Old Bailey took place outside Newgate until the abolition of public executions in 1868.

The prison was used both for criminals and debtors until 1815, when the latter were sent to White Cross Street Prison. In 1877 the prison was transferred from the City Corporation to the Crown, and has been managed by the Prisons Commissioners since that date.

Under the Central Criminal Court Act, 1834 (4 & 5 Will. IV. c. 36, s. 9), Newgate could be used as a place for the execution of any sentence passed at the Central Criminal Court, and as a place for the detention of persons committed from London, Middlesex, Kent, or Essex, for trial at the Court (s. 10), and for persons whose trial was removed to that Court under the Palmer Act (19 & 20 Vict. c. 16, s. 5), or the Jurisdiction on Homicides Act. Under the changes effected by the Prison Act, 1877, and the Central Criminal Court Prisons Act, 1881 (44 & 45 Vict. c. 64), it is used for the confinement of prisoners before and during trial at the Central Criminal Court, whether under its ordinary jurisdiction or its extended jurisdiction, under Orders in Council as to winter and spring assizes. It is also used for the execution of some death sentences passed at the Central Criminal Court (44 & 45 Vict. c. 64, s. 2), but not for the execution of any other sentences.

[*Authorities*.—Griffith's *Chronicles of Newgate*, 1884; Wheatley and Cunningham, *London, Past and Present*, vol. ii. p. 590.]

New Guinea.—An island in the Pacific Ocean, parts of which were taken under British protection in 1884 and 1885. British New Guinea is within the Pacific Order in Council of the 13th August 1877; see also the Order of 15th March 1893.

[*Authority*.—Hertslet's *Treaties*, xiv. 871, and xix. 570.]

New Inn.—See INNS OF COURT.

New Parish.—See ECCLESIASTICAL COMMISSIONERS, vol. iv. p. 384; PARISH.

News.—Before the Conquest the author and spreader of false rumours among the people had his tongue cut out, unless, indeed, he redeemed his offence by the estimation of his head (Coke, *Inst.* 3. 198). And the Statute Westminster the First (3 Edw. I. c. 34) made the spreading of false news or tales with the object of creating discord between the sovereign and his people, or the great men of the realm, a misdemeanour punishable by fine and imprisonment (confirmed by 2 Rich. II. st. 1, c. 5, and 12 Rich. II. c. 11; cp. Coke, *Inst.* 2. 226). Where the slanderous words were spoken of the sovereign, the appropriate statute was the 1 Edw. VI. and 1 Mary. Again, it is said to be a misdemeanour to fabricate and publish false news with the view of raising or lowering the price of food or merchandise (*R. v. Waddington*, 1800, 1 East, 143; cp. *R. v. De Berenger*, 1815, 3 M. & S., 67); and Scroggs, J., asserted it to be a misdemeanour to publish any news at all, though true and harmless (11 Hargrave's *State Trials*, 322). See SCANDALUM MAGNATUM.

New South Wales—A British colony on the eastern coast of Australia. The first settlement was formed, as a convict station, in 1788; convicts ceased to arrive in 1841. Victoria was separated from New South Wales in 1851, and Queensland in 1859. The first Legislative Council of New South Wales dates from 1824; responsible government was introduced in 1855. Executive authority is entrusted to a Governor; the Legislature consists of the Governor, the Legislative Council, which has now sixty-six members, and the Legislative Assembly, which has a hundred and twenty-five members. Members of the Assembly are paid. The Supreme Court consists of the Chief Justice and six puisne judges; the final appeal is to the Queen in Council (see PRIVY COUNCIL). The laws of New South Wales are English in their origin, and in many matters of importance the legislation of the colony has followed that of the mother country.

[*Authorities.*—Colonial Office List; New South Wales Statutes, and Index to Oliver's *Statutes of Practical Utility*; Cases in the Supreme Court, and New South Wales Law Reports from 1880.]

Newspaper.—A newspaper is to be regarded, legally, from two distinct points of view: as a commercial undertaking and as a literary publication. The legal restrictions on the business of producing a newspaper are now few and unimportant. The censorship, security against sedition, blasphemy, and libel, the advertisement tax, the stamp duty, and the paper duty, are things of the past. The oldest of the surviving restrictions is that the person who prints any paper for "hire, reward, gain, or profit," must, under a penalty of £20, preserve one copy for six months, and on it must be written or printed in fair and legible characters the name and address of the person employing him, and he must produce the same to any justice of the peace requiring him to do so (39 Geo. III. c. 79, re-enacted by 32 & 33 Vict. c. 24). A later Act (2 & 3 Vict. c. 12) requires the printer of a newspaper to print his name and address on the first or last leaf of each copy. Neglect to do this renders the printer, and every person who shall "publish or disperse or assist in publishing or dispersing" the newspaper, liable to a penalty of £5 for each copy. A newspaper is a "book" under the Copyright Act of 1842 (5 & 6 Vict. c. 45), and therefore the publisher is bound to send a copy to each of the five libraries. The

proprietor of the copyright of the newspaper or of any part of it must also, if he wishes to prevent infringement, register the copyright at Stationers' Hall. The proprietor of the newspaper must, if he wishes it to be transmitted by post at newspaper rates, register it at the post office, and in any case it must be registered under the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60). (This Act does not apply to Scotland.)

Proprietors of newspapers, who are also members of public bodies, are partially relieved from the disqualifications imposed on persons having a share or interest in any contract with such body. The Local Government Act, 1888, which enacts the disqualification, lays down (s. 12) the following proviso: "But a person shall not be so disqualified, or be deemed to have any share or interest in any contract or employment, by reason only of his having any share or interest in . . . any newspaper in which any advertisement relating to the affairs of the borough or council is inserted." A member must not, however (s. 22), vote or take part in the discussion of any matter before the council or a committee in which he has directly or indirectly, by himself or his partner, any pecuniary interest. There is a similar proviso in the Education Act, 1870, concerning School Boards. In his business as a publisher of advertisements the proprietor of a newspaper is also subject to the law relating to the publication of lottery advertisements (see *LOTTERIES*; *MISSING WORDS*), advertisements relating to stolen property, and advertisements relating to betting, gaming, and wagering.

As a literary publication, a newspaper is subject to the laws against sedition, treason, and blasphemy, to the law of libel, criminal and civil, to the law relating to contempts, and to the law of copyright; and in so far as such liability is common to all publications it will be found dealt with under the respective heads in the *Encyclopædia*. Newspapers are also, however, the subject of certain special enactments. Clause 2 of Lord Campbell's Act (6 & 7 Vict. c. 96, s. 2) provides that, in case of an action for a libel contained in "any public newspaper or other periodical publication," it shall be competent for the defendant to plead that such libel was published "without actual malice and without gross negligence," and that a full apology was published as promptly as possible. The Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64, ss. 8, 9), provides that "no criminal prosecution shall be commenced against the proprietor, publisher, editor, or any person responsible for the publication of a newspaper, for any libel published therein, without the order of a judge at chambers being first had and obtained"; that the person charged shall have notice and shall have an opportunity of being heard against such application; and that the person charged and the husband or wife of the person charged shall be competent witnesses at every stage of the proceedings. By the Libel and Registration Act of 1881 (44 & 45 Vict. c. 60, ss. 4 and 5), a Court of summary jurisdiction, before which the publisher or other person responsible for a libel in a newspaper is charged, may receive evidence going to prove that the matter charged is true, and that its publication is for the public benefit, or that the report is fair and accurate, and published without malice, and may thereupon dismiss the case, or, if of opinion that the libel was of a trivial character, may convict summarily under the Summary Jurisdiction Act, 1848. A "newspaper," for the purposes of the Acts of 1881 and 1888, is defined as "any paper containing public news, intelligence or occurrences, or any remarks or observations therein, printed for sale, and published periodically or in parts or numbers at intervals not exceeding twenty-six days"; and also as "any paper printed in order to be dispersed and made

public weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements."

The civil privileges conferred by these Acts on newspapers coming within the definition, and publishing reports of public proceedings, are also considerable. A fair and accurate report, published contemporaneously, of proceedings of any Court exercising judicial authority, is absolutely privileged, provided the matter be not in itself blasphemous or indecent. The same applies to a fair and accurate report of a public meeting, *bond fide* and lawfully held for a lawful purpose and for the discussion of matters of public concern, as well as of the public meetings of any vestry, town council, school board, board of guardians, or other local authority constituted by Act of Parliament, or of any of their committees; also of any meeting of commissioners authorised to act by letters patent, Act of Parliament, warrant under the Royal Sign Manual, or other lawful warrant or authority, Select Committees of either House of Parliament, justices of the peace in Quarter Sessions assembled for administrative or deliberative purposes, and to the publication at the request of any Government Office or Department, officer of State, commissioner of police or chief constable, of any notice or report issued by them for the information of the public. This privilege shall, however, be lost if it be proved that the report was published maliciously; or if, as before, the matter be in itself blasphemous or indecent; or if the defendant has refused or neglected to publish a reasonable letter or statement of explanation when requested to do so.

With these exceptions, libellous matter published in a newspaper is subject to the same legal liabilities as if published in any other way (see DEFAMATION; see also PRINTERS).

[*Authorities*.—Powell, *Law affecting Printers*; Fisher and Strahan, *Law of the Press*.]

New Street.—See STREET.

New Style.—In the year 1582, errors having been discovered in the Julian method of computation of the year, Pope Gregory XIII. undertook to reform the Roman calendar, and the alteration made by him in that year created what is commonly termed the New Style, but what was sometimes called the Roman Style, while the calendar obtained the name of the Gregorian Calendar. In it the author ordered that ten days should be struck out of the Roman Calendar, and that the day after the 4th of October 1582 should be called the 15th. He also ordered that certain hundredth years formerly considered leap years, having 366 days, according to the Julian or Old Style, were no longer to be considered such; only fourth hundredth years starting with the year 1600 were to be considered leap years. This style was brought into use at different periods in various countries. As early as the reign of Elizabeth an effort was made to reform the calendar in England (*Lords' Journals*, vol. ii. pp. 99, 102). But it was not till 1751 that an Act was passed (24 Geo. II. c. 23) to make the calendar conform to that of other countries of Europe. The legal year, which before had begun in England on March 25th, was altered to January 1st; this alteration took place on January 1st, 1752. Eleven days were dropped between the 2nd and 14th of September, so that this month contained only nineteen days. It was also enacted by the above statute that every hundredth year (except only every fourth hundredth year, whereof the

year 2000 should be the first) should not be deemed to be leap years, but should be considered as common years consisting of 365 days only (see OLD STYLE).

New Trial.—*In the High Court.*—Since the Judicature Act, 1890, every application for a new trial, or to set aside a verdict, finding, or judgment in any cause or matter in the High Court, whether the trial was with or without a jury, must be made to the Court of Appeal (53 & 54 Vict. c. 44, s. 1; Order 39, r. 1). Upon the hearing of a motion for a new trial, the Court of Appeal has all such powers as are exercisable by it on the hearing of an appeal (Order 39, r. 1 a); and on the hearing of an appeal, the Court has power to order a new trial (Order 58, r. 5). The Act of 1890 applies to a trial before the under-sheriff with a jury, upon a writ of inquiry for the assessment of damages (*Radam's, etc., Co. v. Leather*, [1892] 1 Q. B. 85); but it does not apply to an inquiry before an official referee, and the report of an official referee can only be questioned by an appeal to the Divisional Court (*Glasbrook v. Owen*, 1890, 7 T. L. R. 62; *Gower v. Tobitt*, 1891, 39 W. R. 193).

The usual grounds for a new trial are: (1) misdirection by the judge; (2) the improper admission or rejection of evidence; (3) that the verdict is contrary to the weight of evidence; or (4) that the damages are excessive or insufficient. In *Dickenson v. Fisher*, 1887, 3 T. L. R. 459, a new trial was ordered on the ground that the case, being far down on the list, was called on unexpectedly, and the defendant's witnesses were absent, but only upon payment into Court by the defendant of the damages and costs; and in *Stokes v. Latham*, 1888, 4 T. L. R. 305, an unauthorised compromise was set aside, and a new trial ordered. The Court has also power to order a new trial on the ground of mistake, or inadvertence, or of some slip in the proceedings, but will exercise this discretion with great caution (*Germ Milling Co. v. Robinson*, 1886, 3 T. L. R. 71). Where a plaintiff was non-suited without his consent immediately after his case had been opened, a new trial was granted (*Fletcher v. L. & N.-W. Ry. Co.*, [1892] 1 Q. B. 122).

A new trial may not be granted on the ground of misdirection, or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless some substantial wrong or miscarriage has been thereby occasioned in the trial; and where such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the Court may give final judgment as to part thereof, or some or one only of the parties, and direct a new trial as to the other part only, or as to the other party or parties (Order 39, r. 6). Where the judge has misdirected the jury, it is for the party showing cause against the application for a new trial, to show that no substantial wrong or miscarriage was occasioned by the misdirection (*Anthony v. Halstead*, 1877, 37 L. T. 433: as to the meaning of "substantial wrong or miscarriage," see *Bray v. Ford*, [1896] App. Cas. 44, where the House of Lords reversed the decision of the Court of Appeal; *Manley v. Palache*, 1895, 73 L. T. 98). New trials were ordered on the ground of misdirection in *Kingston Race Stand v. Kingston Corporation*, [1897] App. Cas. 509; *Jenoure v. Delmege*, [1891] App. Cas. 73; and *Bray v. Ford*, *supra*. A new trial may not be granted by reason of the ruling of the judge that the stamp upon a document is sufficient, or that the document does not require a stamp (Order 39, r. 8). Nor will a new trial be granted on the ground of the

premature admission of evidence which became admissible in the course of the trial (*Faund v. Wallace*, 1876, 35 L. T. 361); or on the ground of the discovery of fresh evidence, unless there is a reasonable probability that a different verdict would have been given if such evidence had been adduced at the trial (*Anderson v. Titmas*, 1877, 36 L. T. 711).

The principle upon which the Court acts in granting new trials on the ground that the verdict is against the weight of evidence is, that the verdict ought not to be disturbed unless it is one which no jury, taking a reasonable view of the evidence, could properly find (*Metropolitan Rwy. Co. v. Wright*, 1886, 11 App. Cas. 152; *Brown v. Railway Commissioners*, 1890, 15 App. Cas. 240; *Phillips v. Martin*, 1890, 15 App. Cas. 193; *Australian Newspaper Co. v. Bennett*, [1894] App. Cas. 284; *Brisbane v. Martin*, [1894] App. Cas. 249; *Webster v. Friedeberg*, 1886, 17 Q. B. D. 736; *Ferrand v. Bingley*, 1891, 8 T. L. R. 70). Where contradictory verdicts are found in cross actions, and upon the evidence the jury might reasonably have found either way, the proper course is to order both the actions to be tried again, not separately, but together (*Australasian S., etc., Co. v. Smith*, 1889, 14 App. Cas. 321).

Upon an application for a new trial on the ground that the damages are excessive, the Court has power, with the consent of the plaintiff, and without that of the defendant, to refuse a new trial, on condition that the damages are reduced to such an amount as the Court considers would not have been excessive if awarded by the jury (*Belt v. Lawes*, 1884, 12 Q. B. D. 356; *Gatty v. Farquharson*, 1893, 9 T. L. R. 593); and a new trial will not be granted on the ground of excessive damages, unless the amount is such as no jury could reasonably award (*Praed v. Graham*, 1889, 24 Q. B. D. 53). In an action for personal injuries, where the damages awarded were so small as to show that the jury must have omitted to consider some of the elements of damage, a new trial was ordered (*Phillips v. L. & S.-W. Rwy. Co.*, 1879, 5 Q. B. D. 78).

Every application for a new trial in the High Court must be by a fourteen days' notice of motion, which must be served, if the trial took place in London or Middlesex, within eight days after the trial, and if it took place elsewhere, within seven days after the last day of sitting on the circuits during which the trial took place (Order 39, rr. 3-4*a*). The notice of motion must state the grounds of the application, and whether all or part only of the verdict or findings is complained of (Order 39, r. 3). If the application is on the ground of misdirection, the notice ought to specifically state how and in what respect the judge misdirected the jury; and this rule applies to probate and divorce suits (*Pfeiffer v. Midland Rwy. Co.*, 1886, 18 Q. B. D. 243; *Murfitt v. Smith*, 1887, 12 Prob. Div. 116; *Taplin v. Taplin*, 1887, 13 Prob. Div. 100). A new trial will not be granted on a point which was not taken on the trial until the case had been closed on both sides (*Eyre v. New Forest Highway Board*, 1892, 8 T. L. R. 648). The notice may be amended at any time by leave of the Court (Order 39, r. 5); and the Court has discretion to extend the time for service, and to grant a new trial, on such terms as it thinks fit, though the time for serving the notice has already expired when the application is made (*Wilkins v. Wilkins*, [1896] Prob. 108).

The Court of Appeal will not stay execution pending a motion for a new trial, except under special circumstances; and allegations of misdirection, and that the verdict is contrary to the weight of evidence, or that there is no evidence to support the verdict, are not special circumstances within the meaning of this rule (*Monk v. Bartram*, [1891] 1 Q. B. 346).

Nor will the Court order security for costs on the ground of the poverty of the party moving for a new trial (*Heckscher v. Crosley*, [1891] 1 Q. B. 224; *Walklin v. Johns*, 1891, 7 T. L. R. 181). Where a plaintiff who was applying for a new trial was a foreigner resident abroad, and had been ordered to give security for the costs of the trial, it was held that the proper course was for the defendant to apply at Chambers for the amount of the security to be increased, and that an appeal would lie to the Court of Appeal from any order made on such application (*Bentsen v. Taylor*, [1893] 2 Q. B. 193).

Upon an application for a new trial, the Court may draw all inferences of fact, not inconsistent with the finding of the jury, and if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly; or may direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made, as it thinks fit (Order 40, r. 10); or may order a new trial on any question, without interfering with the finding or decision on any other question (Order 39, r. 7). Where all the materials necessary for determining the question in dispute are before the Court, it may, instead of ordering a new trial, set aside the judgment, and enter judgment for the unsuccessful party at the trial (*Allcock v. Hall*, [1891] 1 Q. B. 444; *Williams v. Mercier*, 1882, 9 Q. B. D. 337; *Hamilton v. Johnson*, 1879, 5 Q. B. D. 263; *Eastland v. Burchell*, 1878, 3 Q. B. D. 432).

Where a new trial is ordered, and no direction is given as to costs, *prima facie* the costs of the whole of the litigation follow the result of the new trial (*Field v. G. N. Rwy. Co.*, 1878, 3 Ex. Div. 261; Order 65, r. 1).

In the County Court.—Where a judgment is given in the County Court in the absence of the defendant, the judge may order a new trial on such terms as he thinks fit (51 & 52 Vict. c. 43, ss. 90, 91). In any other case, the judge, whether he tried the action himself or with a jury, may order a new trial on such terms as he thinks fit, and in the meantime stay proceedings (*ibid.*, s. 93); but the power given by this section is subject to the same limitations, and must be exercised on the same principles, as the power of the Court of Appeal to order a new trial in the High Court (*Murtagh v. Barry*, 1890, 24 Q. B. D. 632). Where an action is remitted from the High Court to the County Court for trial, it becomes a County Court action, and any application for a new trial must therefore be made to the County Court judge (51 & 52 Vict. c. 43, s. 65).

An application for a new trial in the County Court may be made and determined on the day of trial if both persons are present; or may be made at the first Court held next after the expiration of twelve clear days from the day of trial, in which case seven clear days' notice must be given to the registrar, and to the opposite party, stating shortly the grounds of the application (C. C. R. Order 52; Order 31, r. 1*a*). It may be made a condition of the granting of the application, that the action shall be tried with a jury, though it was not originally so tried (C. C. R. Order 31, r. 2).

No appeal lies from the decision of a County Court judge, granting or refusing a new trial, if it appears that he applied the right rule of law in considering whether it should be granted (*How v. L. & N.-W. Rwy. Co.*, [1892] 1 Q. B. 391); but an appeal will lie to the Divisional Court, under sec. 120 of the County Courts Act, 1888, on the ground that the decision is wrong in point of law (*Pole v. Bright*, [1892] 1 Q. B. 603). Upon an appeal against an order for a new trial, the Divisional Court has jurisdiction to set

aside the verdict, and enter judgment for the opposite party (*Bryant v. North Metropolitan Tramways Co.*, 1889, 6 T. L. R. 396).

In Criminal Cases.—There is no jurisdiction to order a new trial in the case of treason or felony, but only in the case of a misdemeanour which has been tried in the Queen's Bench Division, either upon a criminal information, or after a removal into the High Court by writ of certiorari (*A.-G. of New South Wales v. Bertrand*, 1867, L. R. 1 P. C. 520; *R. v. Mawbey*, 1795, 6 T. R. 619, 638). A new trial will not, it seems, be granted after an acquittal, in any case in which the defendant, if convicted, would be liable to imprisonment (*R. v. Duncan*, 1881, 7 Q. B. D. 198; *R. v. Russell*, 1853, 23 L. J. M. C. 173; see, however, *R. v. Chorley*, 1848, 12 Ad. & E. N. S. 515). The decision of the Divisional Court, upon an application for a new trial in a criminal case, is final.

Where there has been a mis-trial in a criminal case, a *venire de novo* may be awarded, and a new trial had thereon, not only in the case of a misdemeanour, but also in the case of treason or felony. In *R. v. Yeadon*, 1862, 31 L. J. M. C. 70, on an indictment at Quarter Sessions for an assault occasioning actual bodily harm, the jury found the defendant guilty of a common assault, and the chairman, mistaking the law, refused to take the verdict, and told the jury that they must either find the defendant guilty or acquit him, and the jury then found him guilty simply. It was held that the first verdict, being a lawful one, ought to have been taken, and that there had been a mis-trial; and a *venire de novo* was awarded. (See also, *R. v. Fowler*, 1821, 4 Barn. & Ald. 273; and as to the distinction between a *venire de novo* and a new trial, see *William v. Lewis*, 1 Wils. 48).

New Trustee.—See TRUSTS; VESTING ORDERS.

New Year's Day.—In England, in the seventh century, the year was reckoned from Christmas day, and this continued to be so until, in the twelfth, the Anglican Church adopted the 25th of March as the beginning of the year; which practice was also adopted by the civilians in the fourteenth century. This style continued until the passing of the Statute 24 Geo. II. c. 23, by which the legal year was ordered to commence on January 1st. In Scotland the year was ordered to commence on the 1st of January instead of the 25th of March 1600, by a proclamation dated the 17th of December 1599. By 34 & 35 Vict. c. 17, New Year's Day is made a bank holiday in Scotland, and bills, etc., becoming due on that day are payable on the following.

New Zealand.—A group of islands in the South Pacific, now forming a British colony. The Maori chiefs ceded the sovereignty to Her Majesty in 1840. The country was at first a dependency of New South Wales, but was separated by letters patent in 1842. In the same year the colony was divided into six provinces; in 1876 the provincial system was abolished. Executive authority is now exercised by the Governor, on the advice of responsible ministers; legislation is carried on by the Governor, the Legislative Council, and the House of Representatives. The members of both Houses are paid. The electoral franchise is wide, and women of both races are permitted to vote. The Supreme Court

consists of the Chief Justice and four puisne judges, who sit in the chief towns of the colony, and as a Court of Appeal at Wellington. From the appellate tribunal there is an appeal to the Queen in Council (see the Orders in Council of 30th November 1864 and 16th May 1871, and the article PRIVY COUNCIL). The laws of New Zealand are English in their origin; the criminal law was codified in 1893.

[*Authorities*.—Colonial Office List; New Zealand Statutes; New Zealand Law Reports.]

Next.—The ordinary sense of this word implies a being nearest or highest, not merely by way of propinquity, as when it is said of three persons on three chairs in a row that those on the outside are equally near or next the centre one, but also by way of arrangement, succession, or relationship, as when in the same case, beginning at one end, the persons are referred to respectively as numbers one, two, and three (Kindersley, V.C., in *Southgate v. Clinch*, 1858, 27 L. J. Ch. 651). *Primâ facie* either sense may be applicable (Page Wood, V.C., in *Eastwood v. Lockwood*, 1867, L. R. 3 Eq. 487). Which sense is to be applied in any given case, will therefore depend upon the intention of the person using the word, a question of fact to be determined by evidence, and depending, apart from an express indication, on the nature of the legal act and the whole circumstances of the case. That sense will primarily be applied which gives the best effect to the word and does not make nonsense, and the onus of showing that a different meaning was intended will lie on the person so alleging (Grove, J., in *Richards v. M'Bride*, 1881, 8 Q. B. D. 119; Parke, B., in *Becke v. Smith*, 1836, 2 Mee. & W. 191).

The cases on the interpretation of "next" may be grouped under two heads, according as the word refers to time or to relationship. And first, as to next before, or next after, in point of time. Primarily the word will be strictly construed. Thus the words "next before any suit or action" in the Prescription Act, 2 & 3 Will. IV. c. 71, ss. 1, 4, and 5, mean next before *some* action, and not necessarily that pending, this interpretation not introducing any absurdity or inconsistency (*Cooper v. Hubbuck*, 1862, 31 L. J. C. P. 323; *Richards v. Fry*, 1838, 7 Ad. & E. 698). So in 12 Anne, st. 2, c. 12, s. 2, the words "next presentation" and "next avoidance" refer to the actual time when the vacancy occurs, and not to the time when the purchase of the right to present is completed (*Walsh v. Bishop of Lincoln*, 1875, L. R. 10 C. P. 518). And where a contract provided for payment "on the 29th of February next ensuing," the words were given effect to by making the day the 29th of February of next leap year (*Chapman v. Beecham*, 1842, 12 L. J. Q. B. 42), though ordinarily the words "th day of next," or "next ensuing," will be construed as "th instant," the word "next" applying to the day as well as to the month (*Chapman v. Beecham*, *supra*; *Brown v. Smith*, 1840, 8 Dowl. 867), even when the contract is dated a prior day in the same month (*Dawes v. Charsley*, W. N. 1886, pp. 37, 78). At the same time, evidence of a custom to construe such phrases in a different way, as to reckon "the next two months" not from the date of the contract, but from the 1st of the next succeeding month, will, in the absence of context to the contrary, be admissible (*Bissell v. Beard*, 1873, 28 L. T. N. S. 740). And if a strict grammatical interpretation leads to an unreasonable result, a more liberal one will be adopted. Thus in the case of Acts referring to rating appeals and the like, the words "next sessions" have been held to mean next possible or practicable sessions (*Richards v.*

M'Bride, supra; *R. v. Justices of Surrey*, 1880, L. R. 6 Q. B. D. 100; *R. v. Justices of Sussex*, 1865, 34 L. J. M. C. 69; *R. v. Justices of Flintshire*, 1797, 7 T. R. 200; *R. v. Justices of Yorkshire*, 1789, 3 T. R. 150), and the appellant will be allowed a reasonable time for considering whether he will appeal or not (*R. v. Justices of Surrey, supra*; *R. v. Justices of Sussex, supra*; *R. v. Justices of Flintshire, supra*). So, under the Sunday Closing (Wales) Act, 1881, 44 & 45 Vict. c. 61, s. 3, which provided that the Act should commence on "the day next appointed" for the Brewster sessions, it was held that the day pointed out was that one which after the passing of the Act should be next appointed, for to read it as "the next day appointed" would be to change the word "next" from an adverb to an adjective, and there was nothing in the Act to show that it was so intended (*Richards v. M'Bride, supra*).

When the word "next" refers to relationship, similar rules of construction prevail, and unless the person using the word has made his own arrangement, the ordinary meaning will prevail. This was said of the phrase "next entitled in remainder" (*Turton v. Lambarde*, 1860, 29 L. J. Ch. 361); and the words "next surviving son" and "next survivor according to seniority of age and priority of birth" have been held to indicate the next younger, and not the next elder (*Eastwood v. Lockwood, supra*). So, according to Coke on Littleton, 88a, "next friend" means next of blood, pointing out consanguinity instead of affinity, and the eldest of those of equal degree. In the same way, "next heir" or "next heir-at-law" means the true heir, and not the next of kin, the words being of purchase and not of limitation (*In re Parry and Daggs*, 1885, L. R. 31 Ch. D. 130; *Doe d. Knight v. Chaffey*, 1847, 17 L. J. Ex. 154; *Southgate v. Clinch, supra*). But "next male kin," "next personal representatives," and "next legal representatives" refer not to one person, but to a class of persons, namely, the nearest of kin, according to the Statute of Distribution, living at the testator's death, who will take primarily as joint tenants (*In re Chapman*; *Ellick v. Cox*, W. N. 1883, p. 232; *Stockdale v. Nicholson*, 1867, L. R. 4 Eq. 359; *Booth v. Vicars*, 1844, 13 L. J. Ch. 147).

Next Avoidance; Next Presentation.—See ADVOWSON; PRESENTATION; NEXT.

Next Friend.—A person who is under disability, whether such disability arise from infancy or mental incapacity, is unable to sue without the assistance of some other person, who may conduct the proceedings on his behalf, and may be responsible for costs. Such person is called the next friend (*Prochein amy, proximus amicus*). Every application to the Court on behalf of an infant is made by him through a next friend; nor can a person of unsound mind (that is, as distinguished from a lunatic, one not so found by inquisition) approach the Court except through the medium of a next friend. Formerly a next friend was also required in the case of a *feme covert* plaintiff; but the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), has altered the status of married women in this as in other respects, and by sec. 1 (2) of that Act a married woman is now capable of suing and being sued in all respects as if she were a *feme sole*. Accordingly, the Rules of the Supreme Court, 1883, provide that married women may sue and be sued as provided by the Act above referred to (Order 16, r. 16). This article, therefore, will be confined to a consideration of the position of

next friends of infants and persons of unsound mind, and of the rules and practice of the Court relating to them.

A. OF INFANTS.

By the common law infants could not sue or defend except by guardian. The next friend was not known before the Statutes of Westminster 1 (3 Edw. I. c. 48) and Westminster 2 (13 Edw. I. c. 15). It has been said that at law an infant could sue either by guardian or by *prochein amy* (*per guardianum* or *per proximum amicum*) admitted by the Court for that purpose; and if the admission were to sue *per guardianum* when it should be *per proximum amicum*, it was well enough, there being many precedents both ways, but if he was sued it must be *per guardianum* (Jacob's *Law Dictionary*, 10th ed., 1782; *Co. Litt.* 135 b; 2 *Inst.* 261). In later times, however, it was the invariable practice for an infant to sue at law by *prochein amy*, and defend by guardian. In the Courts of law the *prochein amy* was assigned by the Court, of which he was considered to be an officer; in the Court of Chancery, on the other hand, no order was required, but any person could as next friend of an infant voluntarily institute proceedings on his behalf.

This distinction between proceedings at law and in equity respectively no longer exists, for under the present practice infants sue as plaintiffs by their next friends in the manner before the Rules of the Supreme Court, 1883, practised in the Chancery Division (Order 16, r. 16). Nor is this rule confined to the institution of an action properly so called, but every application to the Court of whatever nature (as, *e.g.*, a motion to remove a next friend, *Cox v. Wright*, 1863, 9 Jur. N. S. 981), must be made on behalf of an infant by next friend. The next friend can only apply as such, or rather the application is the application of the infant by his next friend (*Pidduck v. Boulton*, 1852, 2 Sim. N. S. 223).

Why Next Friend so styled.—

Where an infant claims a right or suffers an injury, on account of which it is necessary to resort to the jurisdiction of the Court, his nearest relation is supposed to be the person who will take him under his protection, and institute a suit to assert his rights; and it is for this reason that the person who institutes a suit on behalf of an infant is termed his next friend; but as it frequently happens that the nearest relation of the infant is the person who invades his rights, or at least neglects to give that protection to the infant which his consanguinity or affinity calls upon him to give, the Court, in favour of infants, will permit any person to institute suits on their behalf; and whoever thus acts the part which the nearest relation ought to take is styled the next friend of the infant

(Lord Redesdale, p. 25; *Andrews v. Cradock*, 1713, Ch. Pre. 376; *Anon.*, 1737, 1 Atk. 569; *Eyre v. Countess of Shaftesbury*, 1722, 2 P. Wms. p. 119).

Who may be Next Friend.—The father of an infant can claim the right to be appointed next friend as against a stranger, where his interests and those of the infant do not conflict (*Woolf v. Pemberton*, 1877, 6 Ch. D. 19); and so also a testamentary guardian (*Hutchinson v. Norwood*, 1885, 31 Ch. D. 237).

A defendant ought not to be the next friend (*Payne v. Little*, 1851, 13 Beav. 114; *Anon.*, 1847, 11 Jur. 258), unless indeed he be a mere formal party (*In re Taylor, Taylor v. Taylor*, 1881, W. N. 51). The name of a defendant, who was also next friend of the plaintiffs, sued with his wife as a co-defendant, was struck out, and his wife ordered to defend alone (*Lewis v. Nobbs*, 1878, 8 Ch. D. 591).

A married woman cannot act as next friend, the provisions of the

Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (2), enabling her to sue as a *feme sole*, being limited to actions relating to herself personally (*In re Duke of Somerset, Thynne v. St. Maur*, 1887, 34 Ch. D. 465).

It has been said that the Court expects the next friend to be a person of substance (*Nalder v. Hawkins*, 1833, 2 Myl. & K. 243). There are, however, many authorities the other way; and certainly security for costs will not be required from the next friend of an infant, even if in indigent circumstances (*Anon.*, 1737, 1 Atk. 569; *Squirrel v. Squirrel*, 1792, 2 Dick. 765; *Pennington v. Alvin*, 1823, 1 Sim. & St. 264; *Fellows v. Barrett*, 1836, 1 Keen, 119; *Murrell v. Clapham*, 1836, 8 Sim. 74; *Hind v. Whitmore*, 1856, 2 Kay & J. 458). In the case of a married woman suing by next friend, the case was different (*Pennington v. Alvin*, 1823, 1 Sim. & St. 264), the reason for the distinction being that an infant could not, whilst a married woman could, select the next friend, and also because the Court readily entertains a suit on behalf of infants, and will of its own accord stay the proceedings in such a suit if not for the infant's benefit (*Hind v. Whitmore*, 1856, 2 Kay & J. 458). The next friend of an infant may, however, be ordered to give security for the costs of an appeal (*Swain v. Follows*, 1887, 18 Q. B. D. 585).

Under special circumstances, an infant has been admitted to sue by next friend *in forma pauperis* (*Lindsay v. Tyrrell*, 1857, 2 De G. & J. 7).

Consent of Next Friend.—Before the name of any person is used in any action as next friend of any infant, he must sign a written authority to the solicitor for that purpose, and the authority must be filed in the Central Office, or District Registry, if the cause or matter is proceeding there (Order 16, r. 20).

No person is to be added as next friend of any plaintiff under disability without his own consent in writing thereto (Order 16, r. 11).

The name of a person who had been made next friend without his authority was ordered to be struck out, with liberty to name a new next friend (*Ward v. Ward*, 1843, 6 Beav. 251).

Proceedings commenced without Next Friend.—Where, after bill filed, it was discovered that the plaintiff, though suing as an adult, was really an infant, leave to amend by adding a next friend was given (*Flight v. Bolland*, 1828, 4 Russ. 298; 28 R. R. 101). And a defendant may apply for dismissal of an action commenced on behalf of an infant without a next friend, with costs to be paid by the solicitor (*Daniell's Ch. Pr.* p. 106).

Infant en ventre sa mere.—It is established by very old authority that an action may be brought by a next friend even on behalf of an infant *en ventre sa mere* (*Lutterel's case*, cited in *Hale v. Hale*, 1692, Ch. Pre. 50; *Musgrave v. Parry*, 1752, 2 Vern. 710).

Inquiry whether Suit for Infant's Benefit.—It has been established by numerous cases, that, so far from discouraging suits instituted by next friends on behalf of infants, the Court is slow to interfere, unless it be shown that the proceedings are not really taken in the interest of the infant. Upon a *prima facie* case being made out, an order will be made directing an inquiry whether the suit is for the benefit of the infant (see *Da Costa v. Da Costa*, 1732, 3 P. Wms. 140; *Whittaker v. Marlar*, 1786, 1 Cox, 285; *Stevens v. Stevens*, 1821, 6 Madd. 97; *Towsey v. Groves*, 1863, 7 L. T. 778). The principles on which the Court acts are stated in the judgment of Brougham, L.C., in the case of *Nalder v. Hawkins*, 1833, 2 Myl. & K. 243, in words which have been often quoted: "The true and just principle which should govern all such cases is this: no discouragement ought to be

thrown in the way of persons *bonâ fide* suing as next friends; but no undue facility should be given to mere volunteers who interfere rather for their own purposes than for the infant's advantage. While they appear to act *bonâ fide* they will be protected: the presumption will rather be in their favour; the proof will rather be thrown upon those who impeach their motives; the leaning will be more for than against them. But no strained presumptions will be made to protect them; no forced constructions will be put on their conduct; no benefit from bare possibilities will be conjured up in their behalf. They must be content to have their motives appreciated, and their acts judged, like other parties. If they have involved themselves in suspicion, their proceedings must be subjected to inquiry; if they have incurred just blame, be it by improper interference, or be it by unnecessary interference, they must abide the consequences: the suit at their instance must be stayed; or if the suit be useful to the infant, but the parties instituting it be unfit to conduct it, they must give place to others in whom the Court can better repose confidence. It follows that every such case must depend upon the circumstances; nor will the Court even order an inquiry unless just cause of suspicion exists" (see also *Cross v. Cross*, 1845, 8 Beav. 455; *Smallwood v. Rutter*, 1851, 9 Hare, 24; *Starten v. Bartholomew*, 1843, 6 Beav. 143). The form of inquiry directed in such cases is usually whether the suit was for the benefit of the infant, and if so, whether the next friend was a proper person to conduct it. The Court of Appeal will not interfere with the discretion of the judge in directing such an inquiry (*Pensotti v. Pensotti*, 1874, 22 W. R. 461).

The next friend cannot himself apply to have the inquiry directed (*Jones v. Powell*, 1817, 2 Mer. 141).

If the suit is shown to have been improperly instituted, it may be dismissed, with costs to be paid by the next friend (*Fox v. Surwerkerop*, 1839, 1 Beav. 583); and this may even be done in a clear case without any inquiry being directed (*Sale v. Sale*, 1839, 1 Beav. 596); or the suit may be stayed (*Richardson v. Miller*, 1826, 1 Sim. 313). Where a suit was instituted, a nominee of the father of the infant plaintiff being next friend, and the father conducting the proceedings, the Court refused to dismiss it (*Gravatt v. Tann*, 1866, 15 W. R. 83).

If the suit is found to be a proper one, but that for some sufficient reason the next friend is not the proper person to conduct it, he may be removed, and a new next friend appointed (*Taylor v. Oldham*, 1822, Jac. 527).

Where two suits are instituted concurrently by separate next friends, it is of course to refer them to see which of the two is most for the benefit of the infant, the result being at the risk of the party applying (*Sullivan v. Sullivan*, 1816, 2 Mer. 40). After judgment such an inquiry is not usually directed (*Taylor v. Oldham*, 1822, Jac. 527). Nor is it proper, in a judgment directing accounts to be taken, that an inquiry should be added as to the benefit which had accrued from the institution of the suit (*Clayton v. Clarke*, 1861, 7 Jur. N. S. 562).

Powers of Next Friend.—In all causes or matters in which an infant or person under other disability is a party, any assent as to the mode of taking evidence, or as to any other procedure, shall, if given with the consent of the Court or a judge, by the next friend, guardian, committee, or other person acting on behalf of the person under disability, have the same force and effect as if such person were under no disability, and had given such consent (Order 16, r. 21; see *Knatchbull v. Fowle*, 1876, 1 Ch. D. 604; *Fryer v. Wiseman*, 1876, 45 L. J. Ch. 199). This includes the power to com-

promise (*Leeming v. Murray*, 1880, 28 W. R. 338), but not where the agreement is of no benefit to the infant (*Rhodes v. Swithenbank*, 1889, 22 Q. B. D. 577). The Court has no jurisdiction to enforce a compromise upon infants against the opinion of the next friend and his advisers (*In re Birchall, Wilson v. Birchall*, 1880, 16 Ch. D. 41).

Discovery can be obtained from the next friend of an infant (Order 31, r. 29). This rule has made obsolete previous decisions to the contrary (*In re Corsellis, Lawton v. Elwes*, 1883, 31 W. R. 414; *Ingram v. Little*, 1883, 11 Q. B. D. 151; *Dyke v. Stephens*, 1885, 30 Ch. D. 189).

The next friend of an infant cannot act as receiver in the action (*Stone v. Wishart*, 1817, 2 Madd. 64). And in *Taylor v. Oldham*, 1822, Jac. 527, it was held that the son of the next friend ought not to be receiver.

In a partition action, a request for sale under the Partition Act, 1876 (39 & 40 Vict. c. 17), s. 6, may be made by the next friend of an infant (*Rimington v. Hartley*, 1880, 14 Ch. D. 630).

Removal of Next Friend.—Various circumstances will induce the Court to make an order for removal of the next friend from his office, arising from (a) his conduct, or (b) from the fact that his interest and his duty conflict, or (c) from his connection with the other parties to the suit.

Thus a next friend will be removed if he does not proceed properly with the action (*Ward v. Ward*, 1813, 3 Mer. 706). Unreasonable refusal by a next friend to appeal has been held to be ground for his removal (*Dupuy v. Welsford*, 1880, 28 W. R. 762).

Where the interest of the next friend is adverse to that of the infant, he will be removed (*Gee v. Gee*, 1863, 12 W. R. 187).

And so the Court will remove a next friend, and appoint another in his place, where the former is so connected with a defendant having an adverse interest to that of the infant, as to make it probable that the interest of the infant will not be properly protected (*Peyton v. Bond*, 1827, 1 Sim. 390). In *In re Burgess, Burgess v. Bottomley*, 1883, 25 Ch. D. 243, a next friend was removed where his connection with the defendants made it improper that he should continue to act. There ought not to be, either in form or substance, the same person both plaintiff and defendant. The mere fact that a next friend was nearly connected with the accounting party in the suit was held insufficient ground for his removal (*Sandford v. Sandford*, 1863, 11 W. R. 336).

Apart from any impropriety in the conduct of the next friend, he will be displaced as a matter of course in favour of the father of the infant (*Woolf v. Pemberton*, 1877, 6 Ch. D. 19), or of his testamentary guardian (*Hutchinson v. Norwood*, 1885, 31 Ch. D. 237).

On applications of this nature the Court looks only to the interest of the infant, and if it be detrimental to such interest that the next friend should remain, will on that ground alone remove him (*Sandford v. Sandford*, 1863, 11 W. R. 336).

The Court ought not to remove a next friend without giving him the opportunity of being heard in his own defence (*In re Corsellis, Lawton v. Elwes*, 1884, 32 W. R. 965).

Retirement of Next Friend.—A next friend will not, it seems, be allowed to retire at his own request without giving security for costs already incurred (*Davenport v. Davenport*, 1822, 1 Sim. & St. 101; *Wilts v. Campbell*, 1806, 1 Ves. 492). In such cases the Court has required to be satisfied by affidavit of the circumstances and respectability of the proposed substitute (*Harrison v. Harrison*, 1842, 5 Beav. 130). In *Davenport v. Davenport*, 1822, 1 Sim. & St. 101, the Court refused to inquire into the circumstances

of the proposed next friend, though it was suggested that he was indigent.

Death of Next Friend.—When the next friend dies pending the action, the plaintiff should by a next friend *pro hac vice* apply for an order of course for the appointment of a new next friend. The consent of such new next friend is of course necessary; but it is not necessary that his fitness should be proved. The nearest paternal relatives of the infant are entitled to nominate the new next friend (*Talbot v. Talbot*, 1874, L. R. 17 Eq. 349).

Proceedings after Infant attains his Age.—After the infant has attained his majority, the next friend should take no proceedings in his name (*Brown v. Weatherhead*, 1844, 4 Hare, 122).

The infant may elect to abandon the suit, and may obtain an order to dismiss with costs, to be paid by himself, but he cannot, in the absence of proof that the action was improperly brought, make the next friend pay the costs (*Anon.*, 1819, 4 Madd. 461).

Costs.—It has been already stated that the main object of providing that infants should sue by next friend was that there should be some person responsible on their part for costs. Indeed, in a modern case, it has been suggested that this was the only reason for the rule. "In the Court of Chancery a suit on behalf of an infant was brought in his name by a next friend, in order to give security for the costs to the defendant, but if the suit had been commenced without the intervention of a next friend, and the defendant chose to appear, I know of no reason why it should not have been prosecuted without a next friend" (per James, L.J., *Ex parte Brocklebank*, *In re Brocklebank*, 1877, 6 Ch. D. 358). It follows that, as between the next friend and the defendant, the former is liable for the costs of the action. Thus he has been ordered to pay the costs of an unsuccessful action, though commenced under the sanction of the report of the Master (*Frank v. Mainwaring*, 1839, 4 Beav. 37). And where the name of a new next friend was used without his authority, and the bill was dismissed with costs, to be paid by the next friend, it was held that he was properly fixed, as between himself and the defendant, with all the costs, and not merely with those incurred whilst he was next friend, though entitled to recover them over against the solicitor who had improperly used his name (*Bligh v. Tredgett*, 1851, 5 De G. & Sm. 74).

But though a next friend is liable to a defendant, he will, unless his conduct has been improper, be allowed, as between himself and the infant, his costs of proceedings properly instituted for the infant's benefit (*Dunn v. Dunn*, 1854, 3 Drew. 17). It was held by Lord Thurlow, L.C., that nothing short of a dishonest intention was sufficient to fix a next friend personally with costs; and that no degree of mistake or misapprehension was sufficient (*Whittaker v. Marlar*, 1786, 1 Cox, 285; and see *Taner v. Ivie*, 1752, 2 Ves. 465; *Campbell v. Campbell*, 1837, 2 Myl. & Cr. 25). But the Court is more careful than formerly in giving costs out of the estate. "One of the great benefits which have been achieved of late years is to discourage actions the costs of which, under the old system, were given too freely out of the estate. Let next friends take care what they are about when they institute hostile actions in the names of infants. They ought not to be allowed to institute actions which fail except at their own risk, and not at the risk of the infants (per Lindley, L.J., *In re Fish*, *Bennett v. Bennett*, [1893] 2 Ch. p. 422).

Costs are generally allowed to a next friend as between solicitor and client (*Brown v. Weatherhead*, 1844, 4 Hare, 122; *Palmer v. Jones*, 1874, 22 W. R.

909). But solicitor and client costs have been refused (*Osborne v. Denne*, 1802, 7 Ves. 423).

"A next friend is entitled to fair expenses beyond taxed costs, under the head of just allowances. As infants cannot incur charges and expenses, if they cannot be claimed under just allowances, and the next friend is to be at the whole expense of the infant beyond his costs, persons will deliberate before they accept the office" (*Fearn v. Young*, 1804, 10 Ves. 184; and see JUST ALLOWANCES).

Where the costs of infant plaintiffs suing by their next friend are directed to be paid out of a fund in Court to which the infants are entitled in reversion, only party and party costs will be immediately paid, the next friend having liberty to apply for the difference between those costs and costs as between solicitor and client when the fund comes into possession (*Damant v. Hennell*, 1886, 33 Ch. D. 224).

As to the lien of a solicitor on property of an infant recovered or preserved in a suit commenced on his behalf by a next friend, see *Baile v. Baile*, 1872, L. R. 13 Eq. 497; *Prichard v. Roberts*, 1873, L. R. 17 Eq. 222.

A next friend may in a proper case be ordered to pay personally the costs of proceedings instituted by him (*Whittaker v. Marlar*, 1786, 1 Cox, 285; *Flight v. Bolland*, 1828, 4 Russ. 298; *Anderton v. Yates*, 1850, 5 De G. & Sm. 202; *Clayton v. Clarke*, 1861, 7 Jur. N. S. 562).

B. OF PERSONS OF UNSOUND MIND.

Originally persons of unsound mind were unable to sue at all. To quote the words of an old authority: "Also there was a time when ideots, madmen, and such as were deafe and dumb naturally were disabled to sue, because they wanted reason and understanding (*tales enim non multum distant a brutis*). But at this day all may sue, for the suit must be in their own name, but it shall be followed by others. And note that when an ideot doth sue or defend, he shall not appeare by gardian or procheine amy or attorney, but he must be ever in person" (*Co. Litt.* 135 b).

Prior to the Judicature Acts, in the common law Courts lunatics sued and were sued in person or by attorney. Idiots appeared in person, and a next friend was then allowed to intervene. In the Court of Chancery lunatics sued by the committee of the estate, or, if there was none, by next friend, whilst a person of unsound mind not so found, sued by next friend.

Under the present practice, where lunatics and persons of unsound mind not so found by inquisition might respectively, before the Judicature Act, have sued as plaintiffs in any action or suit, they may respectively sue as plaintiffs in any action by their committee or next friend, according to the practice of the Chancery Division (Order 16, r. 17).

A next friend, therefore, is only required where the party seeking the assistance of the Court is suffering from mental incapacity, but has not been formally found a lunatic by inquisition. After inquisition he sues by committee. Where, however, the committee has an interest in the action adverse to that of the lunatic, or where the Court, sitting in lunacy, is of opinion that proceedings ought not to be directed at the expense of the lunatic's estate (*In re Gordon*, 1875, L. R. 10 Ch. 192), the suit will be brought by next friend. A bill was ordered to be taken off the file where there was no next friend on behalf of a person suffering from mental incapacity (*Wartnaby v. Wartnaby*, 1821, Jac. 377; *Blake v. Smith*, 1832, Younge, 594).

What Actions may be brought by Next Friend.—It was at one time held

that a bill would not lie, on behalf of a person of unsound mind not so found by inquisition, by a next friend in a case relating to his real estate, as, *e.g.*, for partition (*Halfhide v. Robinson*, 1874, L. R. 9 Ch. 373); but under the Partition Act, 1876 (39 & 40 Vict. c. 17), s. 6, a person of unsound mind not so found may, by his next friend, be plaintiff in an action instituted for the purpose of obtaining a sale (*Watt v. Leach*, 1878, 26 W. R. 475; *Porter v. Porter*, 1887, 37 Ch. D. 420). See also *Light v. Light*, 1858, 25 Beav. 248, and the judgments of James, L.J., in *Beall v. Smith*, 1873, L. R. 9 Ch. pp. 92, 93, and of Jessel, M. R., in *Jones v. Lloyd*, 1874, L. R. 18 Eq. pp. 274–277; *Fisher v. Melles*, 1870, L. R. 18 Eq. 268 (*n*).

An action for recovery of land may be brought by the next friend of a person of unsound mind; but where the Court is of opinion that such action is not a beneficial one it will be stayed (*Waterhouse v. Worsnop*, 1888, 59 L. T. 140).

Position of Next Friend.—"The law of the Court of Chancery undoubtedly is that in certain cases where there is a person of unsound mind not so found by inquisition, and therefore incapable of invoking the protection of the Court, that protection may in proper cases, and if and so far as may be necessary and proper, be invoked on his behalf by any person as his next friend. But every person so constituting himself officiously the guardian, committee, and protector of a person of unsound mind does so entirely at his own risk, and he must be prepared to vindicate the necessity and propriety of his proceedings if they are called in question, and to bear the consequences of any unnecessary and improper proceedings. He takes the risk, moreover, of having his proceedings wholly repudiated by the lunatic, if he should recover his reason, just as the next friend of an infant runs the risk of having his proceedings wholly repudiated on the infant attaining his full age" (per James, L.J., *Beall v. Smith*, 1873, L. R. 9 Ch. pp. 91, 92).

What has been said *supra* regarding to the next friends of infants applies *mutatis mutandis* to those who fill that office towards persons of unsound mind. It must, however, be remarked that R. S. C. 1883, Order 31, r. 29, only applies to the case of infants and their next friends, and *semble*, therefore, no order for discovery can be obtained against the next friend of a person of unsound mind, on the principle of *In re Corsellis*, *Lawton v. Elwes*, 1883, 31 W. R. 414; *Dyke v. Stephens*, 1885, 30 Ch. D. 189).

Where Plaintiff not really of Unsound Mind.—Where a bill was filed by a next friend on behalf of a person alleged to be of unsound mind, but where sanity was established in lunacy, an order was made that the bill should be taken off the file and the next friend ordered to pay the costs (*Palmer v. Walesby*, 1868, L. R. 3 Ch. 732). And where an action had been commenced in the name of a person of unsound mind by a next friend, and such person denied that he was *non compos*, and applied to have his name removed from the record, an inquiry was directed as to his competency to act (*Howell v. Lewis*, 1891, 40 W. R. 88; and see *Fry v. Fry*, 1890, 15 P. D. 50).

Where, pendente lite, Plaintiff found Lunatic.—As to the results of the plaintiff being found a lunatic, the judgment of James, L.J., in *Beall v. Smith*, 1873, L. R. 9 Ch. 85, may be consulted: "The bill purports to be the bill of a person of unsound mind not so found by inquisition, suing by his next friend. It is essential to any such suit that the plaintiff should be of unsound mind, and that he should not have been found so by inquisition. What is the effect of that state of things ceasing to be? I am of opinion, on principle, and there is no authority to the contrary, that the suit is absolutely paralysed thereby. If he becomes of sound mind, the next friend

can have no pretext for continuing his intervention ; if he is found lunatic by inquisition, so as to be under the control and protection of the Crown and of the Court in lunacy, there is equally no pretext for continuing the officious protection of a self-constituted guardian or committee when there is a legitimate protection in the proper tribunal. . . . I am satisfied that every proceeding and every order taken or made in the suit after the inquisition was irregular and void, as much so as if it had been taken or made after the lunatic's death. Moreover, any such attempt to deal with a lunatic's property after the inquisition amounts to a gross contempt of the Court in lunacy" (pp. 94, 95). In *In re Green's Estate*, *Green v. Pratt*, 1879, 41 L. T. 30, leave was given to the committee to continue the action. Where, after decree, a commission of lunacy issued against the plaintiff, proceedings were stayed until the result of the proceedings in lunacy were known (*Hartley v. Gilbert*, 1821, Jac. 377).

[*Authorities.*—*The Annual Practice*, 1898, pp. 369–371, 376–378; Bacon's *Abridgment*, 7th ed., 1832, tit. "Idiots and Lunatics" (G), "Infancy and Age" (K 2); Chitty's *Archbold's Practice*, 14th ed., 1885, chs. xcix. c.; Comyn's *Digest*, 5th ed., 1822, tit. "Idiot" (D 7); Daniell's *Chancery Practice*, 6th ed., 1882, pp. 104–119; Daniell's *Chancery Forms*, 4th ed., 1885, pp. 38–44, 52–54; Macpherson's *Treatise on the Law relating to Infants*, 1842; Pope's *Law and Practice in Lunacy*, 2nd ed., 1892; Lord Redesdale on *Pleading*, 5th ed., 1847; Seton's *Judgments and Orders*, 5th ed., 1891, pp. 820–827; Simpson on the *Law of Infants*, 2nd ed., 1890; Wood Renton on *Lunacy*, 1896, pp. 1014–1016.]

Next-of-Kin.—It will be convenient to consider, first, the rules as to the distribution of the personal estate of a deceased intestate among his next-of-kin; and, secondly, the rules of construction applicable in the case of wills and similar documents. Two degrees of kindred have to be distinguished, the lineal or direct line, and the collateral or indirect line, each of these lines being subdivided according as the relationship is one of consanguinity or one of affinity. The lineal line by way of consanguinity is either ascending, as father, mother, grandfather, grandmother, and so on, or descending, as son, daughter, grandson, granddaughter, and so on; as also is the lineal line by way of affinity, which comprises, when ascending, father-in-law, mother-in-law, step-father, and step-mother, and when descending, son-in-law, daughter-in-law, step-son, and step-daughter. The collateral line by way of consanguinity comprises brothers and sisters, brothers' and sisters' children, uncles and aunts, and the like, while the collateral line by way of affinity comprises brothers' wives, sisters' husbands, uncles' wives, aunts' husbands, and the like. In cases of intestacy, administration may be granted to a husband or a wife or the next-of-kin, or to husband or wife and next-of-kin, and among the kindred those are to be preferred that are nearest in degree to the intestate. The words "nearest in degree" in this case are, however, not to have their strict grammatical construction, for, under the Statute of Distribution, they comprehend both children who are kindred in one degree and also children of children who are kindred in a degree more remote, and not only brothers who are of kindred in one degree, but also children of brothers who are of kindred in a degree more remote (*Withy v. Mangles*, 1841, 10 L. J. Ch. 391). As to finding the degree in the ascending lineal line: from the propositus to the father is one degree, to the grandfather two degrees, and so on; that is, the number of the degree is one less than the number of

persons to be considered. The descending degrees are similarly reckoned. To find the collateral degrees, on the other hand, regard must be had for the *vinculum personarum ab eodem stipite descenditum*; in other words, account has to be taken of the common ancestor of the propositus and the collaterals, and of all intermediate degrees, the distance between the parties being, according to the canon law, the distance of the more remote from the common ancestor, but according to the civil law, the distance from the propositus to the common ancestor and then down to the collateral. The latter rule will generally prevail. Husband and wife are not respectively next-of-kin to each other (*In re Jeffery's Trusts*, 1872, L. R. 14 Eq. 136; *Lee v. Lee*, 1860, 2 L. T. N. S. 532; *Milne v. Gilbert*, 1854, 23 L. J. Ch. 828; *Nichols v. Savage*, 1810, cited in *Bailey v. Wright*, 1811, 18 Ves. 49; *Garrick v. Lord Camden*, 1807, 14 Ves. 372), and therefore in the case of a married woman her children take as nearest of kin (*In re Jeffery's Trusts, supra*). The half blood are equally admitted with the whole blood, and no preference is accorded to relatives *ex parte paternâ* over those *ex parte maternâ*. In case of a conflict of laws, the law of the domicile of the claimant will decide his capacity to take, as, for instance, the capacity of one legitimated according to the law of his domicile by the subsequent marriage of his parents (*In re Grove, Vaucher v. Solicitor to the Treasury*, 1887, 40 Ch. D. 216; *In re Andros, Andros v. Andros*, 1883, 24 Ch. D. 637; *In re Goodman's Trusts*, 1881, 17 Ch. D. 266). In cases of doubt, the Rules of the Supreme Court enable *inter alios* anyone claiming as next-of-kin to take out an originating summons, returnable in the chambers of a judge of the Chancery Division, to determine any question affecting the rights and interests of such next-of-kin, and the ascertainment of who are next-of-kin (see Order 55, r. 3). And it may be mentioned here that the Army Prize (Shares of Deceased) Act, 1864, 27 & 28 Vict. c. 36, s. 3, allows, on the decease of soldiers entitled to prize money, anyone showing himself to the Commissioners of the Royal Hospital, Chelsea, to be entitled, to get payment without probate or letters of administration.

When the term "next-of-kin" occurs in a document, it means, taken by itself, not the next-of-kin within the Statute of Distribution, but the nearest blood relation to the propositus not under any lawful disability; and therefore, for example, brothers and sisters will take to the exclusion of the children of deceased brothers and sisters (*In re Gray, Akers v. Sears*, [1896] 2 Ch. 802; *Harris v. Newton*, 1877, 46 L. J. Ch. 268; *Halton v. Foster*, 1868, L. R. 3 Ch. 505; *In re Webber's Settlement*, 1850, 19 L. J. Ch. 445; *Withy v. Mangles, supra*; *Smith v. Campbell*, 1815, 19 Ves. 400). If, however, the writer or maker has expressed a reference to, or shown an intention to refer to, the statute, that will determine the class who are to take (*In re Gray, Akers v. Sears, supra*; *In re Bradley, Brown v. Cottrell*, 1888, 58 L. T. 631; *Mortimore v. Mortimore*, 1879, 4 App. Cas. 448; *In re Thompson's Trusts*, 1878, 9 Ch. D. 607; *Chalmers v. North*, 1860, 3 L. T. N. S. 140; *Garrick v. Lord Camden, supra*). The presumption will be against the term being used in any artificial sense (*Lee v. Lee, supra*; *Say v. Creed*, 1847, 5 Hare, 580). At the same time, in some cases of doubt, and apart from context to the contrary, the Court has construed the term "next-of-kin" to mean those entitled under the statute (*In re Steevens' Trusts*, 1873, L. R. 15 Eq. 110; *In re Grylls' Trusts*, 1868, L. R. 6 Eq. 589; *Doddy v. Higgins*, 1856, 25 L. J. Ch. 773; *Elmsley v. Young*, 1833, 2 Myl. & K. 82; *Lowndes v. Stone*, 1799, 4 Ves. 649; *Stamp v. Cooke*, 1786, 1 Cox Equity Ca. 234). In any case, the ascertained next-of-kin will

take as joint tenants except where that is impracticable, when they will take as tenants in common (*In re Gray, Akers v. Sears, supra*).

In some cases difficulty is experienced in deciding at what time the next-of-kin who are to take under a settlement are to be ascertained. Primarily the time will be the death of the person whose next-of-kin are pointed out, even though that person has predeceased the testator (a); and if any other time is intended, it ought to be clearly specified (b) (see (a), *Clarke v. Hayne*, 1889, 42 Ch. D. 529; *In re Bradley, Brown v. Cottrell, supra*; *Druitt v. Seaward*, 1885, 31 Ch. D. 234; *Gundry v. Pinniger*, 1852, 21 L. J. Ch. 405; (b) *Mortimore v. Mortimore, supra*; *Chalmers v. North, supra*; *Pinder v. Pinder*, 1860, 29 L. J. Ch. 527; *In re Webber's Settlement, supra*).

The term "next-of-kin" is also frequently found associated with such words as "heirs," "relations," or "representatives," and sometimes these last words are used when next-of-kin are apparently intended. In such cases, if application is made to the Court to construe the instrument, and there are many claimants, to save expense, or for other good reasons, the judge can appoint one of the class to represent all, and the judgment against that one will bind all (R. S. C. Order 16, r. 32). If the word "heirs" is used of personalty, the next-of-kin will generally take (*In re Thompson's Trusts, supra*; *In re Steevens' Trusts, supra*; *Doody v. Higgins, supra*). On the other hand, the term "next-of-kin" applied in the case of realty was construed literally (*Say v. Creed, supra*). Again, bequests to "my friends and relations," "my near relations," "my poor relations," and "the most necessitous of my relations," will be given to the next-of-kin simply according to the statute; but if the word "nearest" is used in place of "next" in connection with "relations," a more strict interpretation will probably be adopted. If the words "nearest of kin in the male line," or "in the female line," are used, these will indicate the nearest of kin *ex parte paternâ* and *ex parte maternâ* respectively, and not males exclusively (*Sayer v. Boys*, 1856, 25 L. J. Ch. 593; *Boys v. Bradley*, 1853, 10 Hare, 389), and females will take even though it was expressed that the male line should take in preference to the female line (*id. ibid.*).

Niece.—See NEPHEWS AND NIECES.

Night.—See BURGLARY, vol. ii. p. 308.

Night Walkers.—From the Conquest, persons who were out of their houses after curfew appear to have been treated as offenders or suspect. By the Statute of Winton (1285), 13 Edw. I. st. 2, c. 4, said to be in affirmance of the common law, town watchmen were required to arrest any stranger who passed by them in the night, and if there was reason to suspect him as an offender, to deliver him to the sheriff. This statute appears to be the authority for an old decision (Year-Book, 13 Hen. VII. f. 10), that a constable may take reasonably suspected persons "which wake in the night and sleep in the day" (*R. v. Tooley*, 1709, 2 Hale P. C. 79 n.); and such persons are said to have been indictable in the sheriff's tourn (Hawk. P. C. bk. 2, c. 10, s. 58). It is clear from the rolls of the Norwich Court Leet (5 Seld. Soc. Pub.), that night rovers (*communes noctivagi*) were regarded as criminals in 1287 (p. 10). The statute was confirmed and strengthened in 1335 by 5 Edw. III. c. 14, an Act dealing with "roberds-

men, wasters, and drawlatches." Dalton (*Country Justice*, c. 124) includes among the persons who may be required to enter into sureties for good behaviour under 34 Edw. III. c. 1 (1361)—

"Night walkers that shall eavesdrop men's houses, or that shall cast men's gates, or carts, or the like into ponds, or commit other outrages or misdemeanours in the night, or shall be suspected to be pilferers, or otherwise like to disturb the peace, or that be persons of ill-behaviour, or of evil fame or report generally, or that shall keep company with any such, or with any other suspicious person in the night."

The Act of 1285 was repealed in 1827 (7 & 8 Geo. IV. c. 27), and that of 1335 in 1856 (19 & 20 Vict. c. 64); and though the Act of 1361 is still in force, it is not used against mere night walkers in the original sense of the term, which had no reference to the sex of the offender.

Under the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47, s. 4), power is given to arrest and punish common prostitutes or night walkers who loiter on or are in a thoroughfare or public place for prostitution or solicitation, to the annoyance of the inhabitants or passengers. A further power is given by the Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89, s. 28). These Acts appear to be limited to women (see PROSTITUTION). But general powers of arrest without warrant are given, with respect to persons found committing any indictable offence in the night, by 14 & 15 Vict. c. 19, s. 11, an Act passed, apparently, to fill up the gap in the law created by the previous repeal of 13 Edw. I. st. 2, c. 4. See ARREST.

Nihil.—In execution, when the sheriff finds that the defendant has no goods that are leviable or of any value, he indorses the writ with a return of nihil or nil (nothing). For instance, that would be the proper return where, under an *elegit*, the execution debtor has no interest in land which is extendible (*Hatton v. Haywood*, 1874, L. R. 9 Ch. 229). The sheriff is, however, apparently under no obligation to make such return unless called upon to do so, and therefore will incur no liability for a non-return unless he has been called upon, and has then made default (*Shaw v. Kirby*, 1888, 52 J. P. 182). So the execution creditor should, if he purposes to issue other writs, call for it; especially under an *elegit*, inasmuch as, when once a writ of *elegit* has been delivered to the sheriff, it can only be followed by other writs of *elegit* unless no lands of the debtor have been extended under it (*Pullen v. Purbeck*, 1700, 12 Mod. 356). When the sheriff might have made a levy but did not do so, an action for damages for making a false return was held to lie against him, the measure of the damages being what the goods leviable would have realised if sold (*Mullett v. Challis*, 1851, 20 L. J. Q. B. 161). But special damage would in such cases always have to be proved (*Stimson v. Farnham*, 1871, L. R. 7 Q. B. 175; *Levy v. Hale*, 1859, 29 L. J. C. P. 127); and if no damage can result to the creditor by the sheriff's act, it appears no action will lie (*Wylie v. Birch*, 1843, 4 Q. B. 566). In short, the sheriff will be protected if he have made his return with a reasonable degree of certainty (*Reynolds v. Barford*, 1844, 13 L. J. C. P. 177). See NULLA BONA.

Nil debet.—This was the old form of general issue pleaded in all actions of debt not founded on specialty, and was much more comprehensive than the plea of *nunquam indebitatus*, which was subsequently substituted for it.

By *Reg. Gen.* Hilary Term, 4 Will. iv., the plea of *nil debet* was prohibited, and the defendant was directed in actions of debt on simple contract, other than on bills of exchange and promissory notes, to plead "that he never was indebted in manner and form as in the declaration alleged" (see *NUNQUAM INDEBITATUS*, and 3 Chitty on *Pleading*, 7th ed., p. 169; Bullen and Leake's *Precedents of Pleadings*, 3rd ed., p. 462). This rule was held not to apply to the plea of *nil debet* by statute given in penal actions by the 21 Jac. I. c. 4, s. 4, as the Statute 3 & 4 Will. iv., which authorises the making of the rules, expressly provided that no such rule should deprive any person of the power of pleading the general issue by statute (see 3 Chitty on *Pleading*, 7th ed., pp. 169 *n.* (a), 215; Bullen and Leake's *Precedents of Pleadings*, 3rd ed., p. 462; *Earl Spencer v. Swannell*, 1838, 3 Mee. & W. 154; *Jones v. Williams*, 1838, 4 Mee. & W. 375), but subsequently by rule 11 of Trinity Term, 1853, it was provided that the plea of *nil debet* should not be allowed in any action, and as the statutes authorising the making of these last-mentioned rules contained no proviso similar to the one contained in 3 & 4 Will. iv., the plea of *nil debet* was entirely abolished (Bullen and Leake's *Precedents of Pleadings*, 3rd ed., p. 462).

Nisi Prius—A phrase used to denote generally all actions tried before judges of the Queen's Bench Division in London. For its origin, see *CIRCUITS AND ASSIZES*. Actions to be tried in London are entered in the lists for Middlesex or London; to the former of which the venue of all actions entered in the London list, and not tried at Guildhall, is to be changed by the Master of the Associates' Department, subject to an appeal to the Lord Chief Justice, or, in his absence, the senior Queen's Bench Division judge present at the Courts (R. S. C. Order 36, r. 29 *b*). By a resolution of the Queen's Bench Division judges, passed on 24th May 1894, it was declared highly important that at least three Courts of *Nisi Prius* should sit continuously through the legal year,—one for special jury causes, one for common jury causes, and one for causes without juries,—and that all other (Queen's Bench Division) judicial business should be considered secondary to this. For the remainder of these resolutions, and the official regulations for the issue of the weekly *Nisi Prius* lists, see the *Annual Practice*, vol. ii. pt. vi.

Nitric Acid Works.—These works are among those which are considered as likely to cause serious nuisances injurious to the health of the neighbourhood in which they are situated, and of the workmen employed in them, unless conducted with the greatest care. They have therefore, in common with other works of a like nature, been placed under special statutory regulations by the Alkali Acts and the Factory Acts. The effect of these Acts in this respect has been dealt with *ante* (vol. ii.) under the heading *CHEMICAL PROCESS*. The works which come under the legal meaning of the term nitric acid works are: (1) alkali works, *i.e.* works in which muriatic acid gas is evolved, that being an acid gas of sulphur and nitrogen (44 & 45 Vict. c. 37, ss. 3 and 29); (2) muriatic acid works, that is to say, works, not being technically alkali works, where muriatic acid is made (54 & 55 Vict. c. 30, Sched. (10)); (3) any works in which the manufacture of nitric acid is carried on (44 & 45 Vict. c. 37, Sched.); and (4) nitrate and chloride of iron works, that is to say, works in which nitric acid or a nitrate is used in the

manufacture of nitrate or chloride of iron (54 & 55 Vict. c. 30, Sched. (9)). Such works must be registered, and can only be carried on subject to the prescribed conditions applicable to them (see article on CHEMICAL PROCESS, *ante*; see also ALKALI WORKS, vol. i.).

Nitro-Glycerine.—See EXPLOSIVES.

Nobility.—See such titles as BARONY; ESTATES OF THE REALM; HONOUR, TITLES OF; PEERAGE; PRECEDENCE.

Noise.—Operations carried on so as to create a noise which affects the reasonable comfort of the public, or of the occupiers of neighbouring premises, may constitute a public or a private nuisance, or both (see *Soltau v. De Held*, 1851, 2 Sim. N. S. 133; and NUISANCE). It is not every occasional or accidental noise which will amount to a nuisance (per Lord Selborne in *Gaunt v. Finney*, 1872, L. R. 8 Ch. 8). So a noise temporarily caused in pumping a shaft during sinking was held to be no legal nuisance, although quieter machinery could have been used (*Harrison v. Southwark Water Co.*, [1891] 2 Ch. 409). The question is essentially one of degree (*Gaunt v. Finney*, *supra*; and see *Christie v. Day*, [1893] 1 Ch. 316, a case of music practice), and consequently of the character and frequency of the noise, and the proximity of its source to the premises affected (see cases following). In judging whether a noise is an actionable nuisance or not, the character of the neighbourhood (*Gaunt v. Finney*, *supra*; *Broder v. Saillard*, 1876, 2 Ch. D. at p. 701; *Tipping v. St. Helens Smelting Co.*, 1865, L. R. 1 Ch. 66; *Bartlett v. Marshall*, *infra*), the ordinary use of the respective premises of the plaintiff and the defendant (*Broder v. Saillard*), and the time, *e.g.* whether during the day or night, when the noise is heard (*Webb v. Barker*, 1881, W. N. p. 158; *Bartlett v. Marshall*, 1896, 44 W. R. 251), must be considered. Instances of operations causing nuisance by noise in reported cases are: building operations, at night (*Webb v. Barker*, *supra*); newspaper carriers' carts, at night (*Bartlett v. Marshall*, *supra*); engines and saws (*Husey v. Bailey*, 1895, 11 T. L. R. 221); printing machines (*Heather v. Pardon*, 1877, 37 L. T. 393); clattering of milk cans in the early morning (*Tinkler v. Aylesbury Dairy Co.*, 1888, 5 T. L. R. 52); a rifle gallery and roundabouts and circuses (*Spruzen v. Dossett*, 1896, 12 T. L. R. 246; *Lambton v. Mellish*, [1894] 3 Ch. 163); a confectioner's pestle and mortar (*Sturges v. Bridgman*, 1879, 11 Ch. D. 852); a dancing room (*Jenkins v. Jackson*, 1888, 40 Ch. D. 71); musical practice (*Motion v. Mills*, 1897, 13 T. L. R. 427; cp. *Christie v. Day*, *supra*); a stable too near a dwelling-house (*Ball v. Ray*, 1873, L. R. 8 Ch. 467; *Broder v. Saillard*, *supra*).

In *Germaine v. London Exhibitions Ltd.* (1896, 75 L. T. 101), an injunction to prevent the proprietors of an exhibition carrying on their business so as to cause cabs to collect in order to take away the visitors at night, was refused. The cabs assembled in a place to which they were directed by the police. Under very similar circumstances, but where there was no police direction, and the noise went on all through the night, an injunction was granted (*Bellamy v. Wells*, 1891, 60 L. J. Ch. 156).

If the noise is caused by the simultaneous operations of two defendants, both may be restrained, although neither, alone, is creating a nuisance (*Lambton v. Mellish*, [1894] 3 Ch. 163).

It is an actionable wrong, which may be restrained by injunction, to make noises for the purpose of annoying a neighbour, (*semble*) and so as in fact to materially interfere with his comfort (*Christie v. Davey*, [1893] 1 Ch. 316).

Nolle prosequi.—This term, an abbreviation of the phrase *Inde non vult ulterius prosequi*, means an entry on the record of a statement that the plaintiff or prosecutor will proceed no further.

The practice is said to have originated as to indictments, *temp.* Chas. II., possibly as a mode of dispensing with penal laws (*Goddard v. Smith*, 1705, 6 Mod. Rep. 261), but is now well established though rarely used.

1. *Civil*.—The practice fell into disuse in civil cases in favour of what was termed a common law nonsuit (*Cooper v. Tiffin*, 1789, 3 T. R. 511), which has now been abolished (*Fox v. Star Newspaper Co.*, [1898] 1 Q. B. 636). As to its effect, see 1 Wms. Saun. 207 n., and JUDGMENT.

2. *Criminal*.—When an indictment has been found or a criminal information filed, proceedings on it can be stayed only by what is termed entering a *nolle prosequi* against one or all of the defendants (*R. v. Teal*, 1809, 11 East, 307; 10 R. R. 516).

This course is adopted occasionally (1) where it is desired to call the accused as Queen's evidence against another person concerned in the offence charged; or (2) where in case of a misdemeanour a civil action is pending as to the same facts (*R. v. Fielding*, 1759, 2 Burr. 719); or (3) where the indictment or some of its counts are clearly defective or of doubtful validity (*R. v. Cranmer*, 1701, 1 Raym. (Ld.) 721; *R. v. Rowlands*, 1851, 17 Q. B. 671, 685); or (4) where a private prosecution is obviously improper and vexatious, *e.g.* of a foreign diplomatic officer (*R. v. Guerchy*, 1765, 1 Black. W. 545).

In case (1) the modern practice more usually followed is to arraign the approver separately, and offer no evidence against him.

A *nolle prosequi* cannot be entered except on the *fiat* or application of the Attorney-General, or, if his office be vacant, of the Solicitor-General.

The fiat is not granted without examination into the case at the instance of prosecutor or defendant, to see if there is good cause for intervention, and is usually but not invariably withheld until the other side has been heard (*R. v. Allen*, 1862, 31 L. J. M. C. 129). The application is supported by affidavits, certificate of counsel, and a certificate from the proper officer of the Court, stating when the indictment was found or the information filed, and the substance of its contents. A form of the fiat, and the form used in recording it, are given in Short and Mellor, *Cr. Off. Pr.* 639.

Where a *nolle prosequi* is entered on an information (not *ex officio*) in the High Court, the defendant can obtain his costs (*Cr. Off. Rep.* 1886, r. 49).

It may be entered at any stage in the proceedings (1 Chit. *Cr. Law*, 477). When the application is made on the ground of the lunacy of the accused, the proper procedure is to ascertain the lunacy under 39 & 40 Geo. III. c. 94.

The entry when made has not the effect of a judgment on the merits, but resembles that of a common law nonsuit in a civil action, *i.e.* it puts an end to the prosecution (*R. v. Mitchell*, 1848, 3 Cox C. C. 93), and prevents the issue of further process therein (*R. v. Allen*, 1862, 31 L. J. M. C. 129). It is not equivalent to a pardon (*Goddard v. Smith*, 1705, 6 Mod. Rep. 261), nor to an acquittal, for the purposes of a plea of *autrefois acquit* (*R. v. Mitchell*, *ubi supra*, p. 119). It seems, however, to be a determination in favour of the accused for the purposes of an action of MALICIOUS PROSECUTION.

[*Authorities*.—Com. Dig. "Indictment" K.; 1 Chit. *Cr. Law*, 477; Archb. *Cr. Pl.*, 21st ed., 119; Short and Mellor, *Cr. Off. Pr.* 248.]

Nominal Damages.—See DAMAGES.**Nomination (Electoral).**

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PARLIAMENTARY ELECTIONS.—*Former System of Nomination.*—Previously to the Ballot Act, 1872, the nomination of candidates to serve as members of Parliament was effected orally. The usual mode of nominating the candidates was for the sheriff to inquire of the electors whom they pleased to serve them in Parliament, whereupon each candidate was proposed by word of mouth by one elector, and seconded by another (see Roe on *Elections*, 2nd ed., 1818, p. 566). A former authority on election law, speaking of the procedure at parliamentary elections, says that, after certain preliminary forms had been complied with, it was usual for the candidates to be proposed, and the electors then present proceeded to the election, according to the usage of the place, or such agreement as they made among themselves (see Heywood on *County Elections*, 2nd ed., 1812, p. 353; see also Whitelocke on *The King's Writ for Choosing Members of Parliament*, 1766, vol. i. p. 390). It would seem also that, in proceeding to make their choice, the electors were not restricted to the election of either of the persons at first nominated, but candidates might be put forward at any time during the proceedings, even after the poll had commenced (see *Montgomery*, 1705, 15 Com. Journ. 95; *Bristol*, 1775, 1 Doug. 244, 259; *Nottingham*, 1803, 1 Peck. 77; see also Roe on *Elections*, 2nd ed., 1818, pp. 86–88, 566).

Nomination under the Ballot Act.—The nomination of candidates at parliamentary elections, with the exception of university elections, is now, however, entirely regulated by the Ballot Act, 1872. The aim of that Act was to secure an impartial system of voting at parliamentary elections, which should, as far as possible, be exempt from the various forms of external influence which had been observed to operate with serious effect at previous elections. This was effected by the introduction of voting by ballot, secrecy being thus secured (see BALLOT), and by minute regulations as to the nomination of candidates. Under the present system, no one is entitled to have his name inserted in any ballot paper as a candidate unless he has been nominated in the manner provided by the Act (see Ballot Act, 1872, Sched. I. Pt. I. r. 12).

Mode of Nomination.—A candidate for election to serve in Parliament for a county or borough must be nominated in writing. The writing

must be subscribed by two registered electors of such county or borough as proposer and seconder, and by eight other registered electors of the same county or borough as assenting to the nomination (Ballot Act, 1872, s. 1). Each candidate is to be nominated by a separate nomination paper, but the same electors, or any of them, may subscribe as many nomination papers as there are vacancies to be filled, but no more (see *ibid.*, Sched. I. Pt. I. r. 5). On a similar provision with regard to municipal elections, it has been held that, where there were four vacancies to be filled, and an elector subscribed four nomination papers as one of the eight assenting electors, and subsequently subscribed a fifth nomination paper, the first four nomination papers were valid, and the fifth was invalid (see *Burgoyne and Others v. Collins and Others*, 1882, 8 Q. B. D. 450). With regard to the filling up of the nomination papers, it has also been decided that the names of the candidate and of the proposer and seconder must all be filled in before it is subscribed by any of the assenting electors, otherwise the nomination will be invalid (see *Harmon v. Park*, 1881, 7 Q. B. D. 369). In other words, the nomination must precede the assent, the assent must not precede the nomination (see per Lindley, J., *ibid.* at p. 374. See also *Cox v. Davies*, 1898, 14 T. L. R. 427).

The person nominating must be an elector, that is, he must be entitled to vote at the election for which he nominates (see *R. v. Parkinson*, 1867, L. R. 3 Q. B. 11); it is obviously important that this should be so, for if only one candidate be nominated, the nomination is, in fact, the election or vote of the electors.

It is the duty of the returning officer to provide the nomination papers (see Ballot Act, 1872, s. 8), and he must supply a form of nomination paper to any registered elector requiring the same during such two hours as the returning officer may fix, between the hours of ten in the morning and two in the afternoon on each day intervening between the day on which notice of the election was given and the day of election, and during the time appointed for the election (*ibid.*, Sched. I. Pt. I. r. 7). The use of a nomination paper supplied by the returning officer is, however, not obligatory, provided that the paper is in the form prescribed by the Ballot Act, 1872 (*ibid.*, r. 7).

Form of Nomination Paper.—The nomination paper is required to be in the form which is given in Sched. II. of the Ballot Act, 1872, which is as follows:—

Form of Nomination Paper in Parliamentary Election.

We, the undersigned A. B. of _____ in the _____ of _____
and C. D. of _____ in the _____ of _____, being electors for
the _____ of _____, do hereby nominate the following person as a
proper person to serve as member for the said _____ in Parliament:

Surname.	Other Names.	Abode.	Rank, Profession or Occupation.
BROWN	John . . .	52 George Street, Bristol.	Merchant.

(Signed) A. B.
C. D.

NOMINATION (ELECTORAL)

We, the undersigned, being registered electors of the _____, do hereby assent to the nomination of the above-mentioned *John Brown* as a proper person to serve as member for the said _____ in Parliament.

(Signed) E. F., of
G. H., of
I. J., of
K. L., of
M. N., of
O. P., of
Q. R., of
S. T., of

Non-compliance with the rules, or mistake in the use of the forms, contained in the Ballot Act will not invalidate an election, if it appears to the tribunal having cognisance of the question that the election was conducted in accordance with the principles laid down in the body of the Act, and that such non-compliance or mistake did not affect the result of the election (see s. 13; see also *Marton v. Gorrill*, 1889, 23 Q. B. D. 139).

Each candidate is to be described in the nomination paper in such manner as in the opinion of the returning officer is calculated to sufficiently identify such candidate; the description is to include his name, his abode, and his rank, profession, or calling, and his surname is to come first in the list of his names (see *ibid.*, Sched. I. Pt. I. r. 6).

Where a candidate is an Irish peer, or is commonly known by some title, he may be described by his title as if it were his surname.

There have been several decisions as to what is a sufficient description of a candidate in a nomination paper within this rule or similar rules applicable to other elections than parliamentary elections (see, for example, *Mather v. Brown*, 1876, 1 C. P. D. 596; *Henry v. Armitage*, 1883, 12 Q. B. D. 257; *Miller v. Everton*, 1895, 11 T. L. R. 364). As to what is a proper subscription by the assenting electors, see *Gothard v. Clarke*, 1880, 5 C. P. D. 253; *Moorhouse v. Linney and Ashton*, 1885, 15 Q. B. D. 273; *Bowden v. Besley*, 1888, 21 Q. B. D. 309; *Gledhill v. Crowther*, 1889, 23 Q. B. D. 136; *Harding v. Cornwall*, 1889, 60 L. T. 959.

Where a candidate had been twice nominated, one nomination being good, but the other bad, it was held that, having been duly nominated and having a majority of votes, he was entitled to be returned (see *Northcote v. Pulsford*, 1875, L. R. 10 C. P. 476).

Delivery of Nomination Papers to Returning Officer.—The nomination papers must be delivered to the returning officer at the place of election during the time appointed for the election, by the candidate himself or by his proposer or seconder (see Ballot Act, 1872, s. 1; *ibid.*, Sched. I. Pt. I. r. 8). Delivery of the paper by an agent would not be sufficient (see *Monks v. Jackson*, 1876, 1 C. P. D. 682). As to delivery of the nomination paper by the candidate himself, see *Davies v. Lord Kensington and Harding*, 1874, L. R. 9 C. P. 720.

The candidate nominated by each nomination paper, and his proposer and seconder, and one other person selected by the candidate, are entitled to attend the proceedings during the time appointed for the election; but no other person is entitled to attend the proceedings except for the purpose of assisting the returning officer (see Ballot Act, 1872, Sched. I. Pt. I. r. 8).

As to the adjournment of the nomination, where the proceedings are interrupted or obstructed by riot or open violence, see the Parliamentary Elections Act, 1835, 5 & 6 Will. iv. c. 36, s. 8.

On the nomination paper being delivered to the returning officer, he is

forthwith to publish notice of the name of the person nominated as a candidate, and of the names of his proposer and seconder, by placarding or causing to be placarded the names of the candidate and his proposer and seconder in a conspicuous position outside the building in which the room appointed for the election is situate (*ibid.*, r. 11).

Though, as has already been mentioned, a person is not entitled to have his name inserted in any ballot paper as a candidate unless he has been nominated in manner provided by the Act, every person whose nomination paper has been delivered to the returning officer during the time appointed for the election is to be deemed to have been nominated in the prescribed manner, unless objection be made to his nomination paper by the returning officer or some other person before the expiration of the time appointed for the election or within one hour afterwards (see Ballot Act, 1872, Sched. I. Pt. I. r. 12).

Objections to Nomination Papers.—No objection to a nomination paper on the ground of the description of the candidate therein being insufficient, or not being in compliance with the rule, is to be allowed or deemed valid, unless such objection is made by the returning officer, or by some other person, at or immediately after the time of the delivery of the nomination paper (*ibid.*, r. 6).

It will be noticed that this rule applies only to objections to a nomination paper on the ground of the insufficiency of the description of the candidate; objections to a paper on other grounds may be made by the returning officer or some other person before the expiration of the time appointed for the election or within one hour afterwards (see *ibid.*, r. 12).

It is the duty of the returning officer to decide on the validity of every objection made to a nomination paper, and his decision, if disallowing the objection, is final; but if allowing the objection, his decision is subject to reversal on petition questioning the election or return (see *ibid.*, r. 13).

Although the returning officer has to decide questions as to the validity of the nomination papers, it is now clear that he has no jurisdiction whatever to determine any question as to the disqualification of a candidate, the proper mode of determining such a question being by means of an election petition. The returning officer is the person to determine whether any particular nomination paper to which objection is taken is good or not, and, having determined that the nomination paper is valid, his functions with regard to it are at an end (see *Pritchard v. The Mayor, etc., of Bangor*, 1888, 13 App. Cas. (H. L.) 241. See also *Cox v. Davies*, 1898, 14 T. L. R. 427).

It has been said that it is not the duty of a returning officer at elections to look out for objections in fact to nomination papers when handed in, much less to call the attention of a rival candidate to them; if this were done, it would destroy the confidence of the electors in the impartiality of returning officers (see per Lord Russell, C.J., *R. v. Taylor*, 1895, 59 J. P. 393). The returning officer is apparently under no obligation to hear evidence and enter into a long inquiry, which would delay the proceedings and be extremely inconvenient (see *Moorhouse v. Linney and Ashton*, 1885, 15 Q. B. D. at p. 279; see also *Gothard v. Clarke*, 1880, 5 C. P. D. 253).

Subsequent Proceedings.—If at the expiration of one hour after the time appointed for the election, no more candidates stand nominated than there are vacancies to be filled up, the returning officer must forthwith declare the candidates who may stand nominated to be elected, and return their names to the clerk of the Crown in Chancery; but if at the expiration of such hour more candidates stand nominated than there are vacancies to be filled up, the returning officer must adjourn the election, and take a poll in

the manner required by the Act (see Ballot Act, 1872, s. 1). As to the subsequent proceedings, see the article ELECTIONS.

As to the withdrawal of a candidate after nomination, see the article CANDIDATE. If any candidate nominated during the time appointed for the election is withdrawn in pursuance of the Act, the returning officer must give public notice of the name of such candidate, and the names of the persons who subscribed the nomination paper of such candidate, as well as of the candidates who stood nominated or were elected (see Ballot Act, 1872, Sched. I. Pt. I. r. 10).

As to the death of a candidate after nomination and before the poll, see CANDIDATE; see also *R. v. Stewart*, [1898] 1 Q. B. 552.

Offences in respect of Nomination Papers.—In order so far as possible to afford security against the use of a false or forged nomination paper, or the destruction or defacement of a genuine nomination paper, the Ballot Act, 1872, provides that every person who forges or fraudulently defaces or fraudulently destroys any nomination paper, or delivers to the returning officer any nomination paper knowing the same to be forged, shall be guilty of a misdemeanour, and liable, if he is a returning officer or an officer or clerk in attendance at a polling station, to imprisonment for any term not exceeding two years, with or without hard labour, and if he is any other person, to imprisonment for any term not exceeding six months, with or without hard labour (see s. 3). Any attempt to commit any such offence is punishable in the manner in which the offence itself is punishable (*ibid.*). For an instance of a prosecution for the forgery of a nomination paper at a County Council election, see *R. v. Taylor*, 1895, 59 J. P. 393.

Nomination at University Elections.—The provisions of the Ballot Act do not apply to university elections (see Ballot Act, 1872, s. 31). At elections for universities, therefore, the law with regard to the nomination and election of candidates is the same as before the Act. The candidates are proposed and seconded orally. See also the article ELECTIONS.

MUNICIPAL ELECTIONS.—*Mode of Nomination.*—The nomination of candidates for the office of councillor is regulated by the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, sec. 55 of which Act requires the nomination of candidates for such office to be conducted in accordance with the rules contained in Sched. III. Pt. II. of that Act. As to the effect of non-compliance with these rules, there is a provision similar in effect to the provision of the Ballot Act above referred to in the case of parliamentary elections (see Municipal Corporations Act, 1882, s. 72).

Under these rules every candidate for the office of councillor must be nominated in writing. The written nomination must be subscribed by two burgesses of the borough, or, in the case of a ward election, of the ward, as proposer and seconder, and by eight other burgesses of the borough or ward as assenting to the nomination (see *ibid.*, rr. 1 and 2; see also s. 51 (1)). No person may subscribe a nomination paper in or for more than one ward (*ibid.*, s. 51 (2)). As to what is a sufficient and proper subscription of the nomination paper by the assenting burgesses, see the cases mentioned *supra* under the head of NOMINATION AT PARLIAMENTARY ELECTIONS, which are, in fact, decisions with regard to municipal elections, though they apply equally to parliamentary elections.

It is the duty of the town clerk to provide the nomination papers, and he must supply any burgess with as many nomination papers as may be required, and at the request of any burgess he is to fill up a nomination paper (*ibid.*, r. 6).

Each candidate is to be nominated by a separate nomination paper, but the same burgesses, or any of them, may subscribe as many nomination papers as there are vacancies to be filled, but no more (*ibid.*, r. 3). Each person nominated must be enrolled in the burgess roll, or entered in the separate non-resident list required by the Municipal Corporations Act, 1882, to be made (*ibid.*, r. 4; see also *Flintham v. Roxburgh*, 1886, 17 Q. B. D. 44).

The nomination paper must be in the form given in Sched. 8 of the Act (see ss. 72 and 240). It must state the surname and other names of the candidate, with his abode and description (*ibid.*, r. 5; see also the cases referred to under the head of NOMINATION AT PARLIAMENTARY ELECTIONS).

Delivery of Nomination Papers to Town Clerk.—The nomination papers having been subscribed, must be delivered by the candidate or by his proposer or seconder (see *Monks v. Jackson*, 1876, 1 C. P. D. 683), at the town clerk's office, seven days at least before the day of election and before five o'clock in the afternoon of the last day for the delivery of the nomination papers; and the town clerk must forthwith send notice of every such nomination to each candidate (*ibid.*, rr. 7 and 8). The nomination of a person absent from the United Kingdom is void unless his written consent, given within one month before the day of his nomination in the presence of two witnesses, is produced at the time of his nomination (*ibid.*, r. 16).

When a person subscribes more nomination papers than one, in the case of an election where there is only one vacancy, his subscription is inoperative in all but the one which is first delivered (*ibid.*, r. 10; see also *Line v. Warren*, 1885, 14 Q. B. D. 548).

Objections to Nomination Papers.—On the day next after the last day for the delivery of nomination papers, the mayor must attend for a sufficient time between the hours of 2 and 4 p.m., and decide on the validity of every objection made in writing to a nomination paper (see r. 9). A person may be appointed by each candidate, or, if absent from the United Kingdom, by his proposer or seconder, as the candidate's representative, to attend the proceedings before the mayor on behalf of the candidate. Such appointment must be in writing and signed, and must be delivered to the town clerk before 5 p.m. of the last day for delivery of nomination papers (*ibid.*, r. 11). Each candidate and his representative may attend the proceedings before the mayor, and object to the nomination paper of any other candidate for the borough or ward, but no other person may attend except for the purpose of assisting the mayor (see *ibid.*, rr. 12 and 13). As to the functions and jurisdiction of the mayor with regard to the decision of objections to the nomination papers, see *Howes v. Turner*, 1876, 1 C. P. D. 671; *Monks v. Jackson*, 1876, *ibid.* 683; *Harmon v. Park*, 1880, 6 Q. B. D. 323; *Pritchard v. Mayor, etc., of Bangor*, 1888, 13 App. Cas. (H. L.) 241. The decision of the mayor must be given in writing, and if disallowing an objection is final, but if allowing an objection is subject to reversal on petition questioning the election or return (Municipal Corporations Act, 1882, Sched. III. Pt. II. r. 14).

Publication of Nominations.—The town clerk must, at least four days before the day of election, cause the surnames and other names of all persons validly nominated, with their respective abodes and descriptions, and the names of the persons subscribing their nomination papers as proposers and seconders, to be printed and fixed on the town hall, and in the case of a ward election in some conspicuous place in the ward (*ibid.*, r. 15).

Relation of Nominations to Election.—With regard to the relation of the number of nominations to the election, it is provided that, if the number of valid nominations exceeds that of the vacancies, the councillors are to be elected from among the persons nominated (Municipal Corporations Act 1882, s. 56 (1)); in such case, also, any candidate may withdraw from his candidature by notice signed by him, and delivered at the town clerk's office not later than 2 p.m. of the day next after the last day for delivery of nomination papers, but such notices are to take effect in the order in which they are delivered, and no notice is to have effect so as to reduce the number of candidates ultimately standing nominated below the number of vacancies (*ibid.*, Sched. III. Pt. II. r. 17). If the number of valid nominations is the same as that of the vacancies, the persons nominated are to be deemed to be elected. If the number of valid nominations is less than that of the vacancies, the persons nominated are to be deemed to be elected, and such of the retiring councillors for the borough or ward as were highest on the poll at their election, or, if the poll was equal, or there was no poll, as are selected for that purpose by the mayor, are to be deemed to be re-elected to make up the required number. And in the event of there being no valid nomination, the retiring councillors are to be deemed to be re-elected (*ibid.*, s. 56 (2)–(4)).

Offences in respect of Nomination Papers.—The forgery or fraudulent defacement or fraudulent destruction of any nomination paper, or the delivery to the town clerk of any forged nomination paper, knowing it to be forged, are misdemeanours punishable with imprisonment for any term not exceeding six months, with or without hard labour, and any attempt to commit any such offence is punishable in the same way (see *ibid.*, s. 74).

SCHOOL BOARD ELECTIONS.—The election of a School Board, including the nomination of candidates, is regulated by the rules prescribed from time to time by order of the Education Department (see Elementary Education Act, 1873, 36 & 37 Vict. c. 86, ss. 6, 26, and Sched. II.). At a School Board election the candidates must be nominated in writing, and, subject to any exceptions or modifications contained in any order of the Education Department, the provisions of the Ballot Act, 1872, are applicable (see Elementary Education Act, 1873, Sched. II. (a) and (b)). See further as to the nomination of candidates at School Board elections, the various election orders published from time to time by the Education Department.

COUNTY COUNCIL ELECTIONS.—The procedure as to the nomination of candidates at County Council elections is as nearly as possible assimilated to that at municipal elections. By the Local Government Act, 1888, 51 & 52 Vict. c. 41, s. 75, the provisions of the Municipal Corporations Act, 1882, as to nomination at municipal elections, are, with necessary modifications, made applicable to County Council elections. It is only necessary here to mention that at County Council elections the returning officer is such person as the County Council may appoint, and such returning officer has power by writing under his hand to appoint a deputy. As regards the nomination of candidates, the returning officer or his deputy exercise the functions and have the powers which in the case of municipal elections are exercised by the mayor or town clerk, and some place fixed by the returning officer is, except where the election is in a borough, substituted for the town clerk's office, and, as respects the hearing of objections to nomination papers, for the town hall, but such place must, if

the electoral division is the whole or part of an urban district, be in that district, and in any other case must be in the electoral division or in an adjoining electoral division. See Local Government Act, 1888, s. 75 (2)–(7).

PARISH COUNCIL AND DISTRICT COUNCIL ELECTIONS, ETC.—The nomination of candidates at Parish Council and District Council elections and other elections under the Local Government Act, 1894, 56 & 57 Vict. c. 73, is regulated by the provisions of that Act, and by the rules contained in the various election orders made from time to time by the Local Government Board, in pursuance of the powers conferred by that Act (*ibid.*, s. 48 (1)). Such rules provide among other things for every candidate being nominated in writing by two parochial electors as proposer and seconder, and no more; for preventing an elector at a union, or for a district not a borough, from subscribing a nomination paper in more than one parish or other area in the union or district; for preventing an elector at an election for a parish divided into parish wards from subscribing a nomination paper for more than one ward; and for the appointment of returning officers for the elections (see *ibid.*, s. 48 (2)). See further the various election orders published from time to time by the Local Government Board.

See also BALLOT; ELECTIONS; RETURNING OFFICER; etc.

Nomina Villarum.—So styled are various lists of towns, villages, etc., made for public purposes. The best known, perhaps, are those which were compiled in the ninth year of Edward II.'s reign with a view to the military levy of one man from each township authorised by the Parliament of Lincoln. They consisted of the returns to writs that had been issued to all the sheriffs of England, directing them to certify to the Exchequer the number of the hundreds and wapentakes in their respective bailiwicks, and the names of the various cities, boroughs, and townships therein, as well as who were the lords thereof. Some of the original rolls, including those relating to the counties of Beds, Bucks, Devon, Lincoln, Middlesex, Salop and Stafford, Southampton and Surrey, are still preserved among the records of the Lord Treasurer Remembrancer. The whole were transcribed by order in Henry VII.'s reign, and copies of this transcription are extant, though the original has been lost.

Other indices of towns, serjeanties, etc., known as *nomina villarum*, are to be found in the *Testa de Nevill of Henry III. and Edward I.* included in the *Liber Feodorum*; and of date Charles II.'s reign are five volumes of *Nomina Villarum* which contain certificates by the bailiffs of liberties in various counties as to towns, etc., referring to the claims of the lords thereof to estreats, felons' goods, and the like.

Nomine pcenæ.—In the civil law, conditions were penal or in the way of a penalty when they involved forfeiture if not complied with, as, for example, would be a condition to heirship imposed by the will of a deceased person (Justinian, *Inst.* ii. 20. 36).

The usual common law application of the expression, however, is to a penalty fixed by a covenant in a lease for the performance of its conditions, especially for the non-payment of rent on the day appointed for the same. The penalty stipulated is usually a gross sum of money, though it may be.

any other payment exactable from the tenant over and above the proper duties when the latter are in arrear. Such a stipulation *nomine pœnæ*, when properly made, becomes incident to the rent, and will therefore, on the demise of an annual rent, pass with it. But there will be no distress for it unless that remedy have been expressly annexed to it; and to entitle him to it, the landlord must make demand for the rent on the very day, as in the case of a re-entry (see *Co. Litt.* 202 a; Woodfall, *Landlord and Tenant*, chap. x. s. 3). So, if the landlord accepts no more than the actual rent "as and for all rent due," he would seem to waive his right to the penalty (*Denton v. Richmond*, 1833, 1 C. & M. 734). Parol evidence will not be allowed of a stipulation to pay additional rent beyond that in the lease (*Preston v. Merceau*, 1779, 2 Black. W. 1249).

Though, strictly speaking, no forfeiture is *nomine pœnæ* unless for non-payment of rent, a variety of other cases of stipulations for additional or increased rents are also included under the term. In these cases the important question is, whether the sums stipulated for are penalties or liquidated damages. So, where the lease of a public-house stipulated that the tenant should not contravene the Licensing Acts so as to get convicted, under a penalty of £50 liquidated damages, that was so construed, and not as a penalty (*Ward v. Monaghan*, 1895, 59 J. P. 532). And a condition to pay an additional rent in case of sub-letting was held good (*Greenslade v. Tapscott*, 1834, 3 L. J. Ex. 328). So, too, as to such conditions in agricultural leases as: not to sell hay off the premises, under a penalty of 2s. 6d. for each yard of hay so sold, to be recovered by distress as for rent in arrear (*Pollitt v. Forrest*, 1847, 11 Q. B. R. 949); or not to sow in other than the prescribed manner, under a penalty of an additional rent (*Jones v. Green*, 1829, 3 Y. & J. 298); or not to plough up ancient meadow, under a penalty of an additional yearly rent per acre (*Rolfe v. Peterson*, 1772, 2 Bro. P. C. 436); or not to take successive crops of the same grain, under a like penalty (*Bowers v. Nixon*, 18 L. J. Q. B. 35); or not to plough above a certain number of acres in the same year (*Domville v. Forde*, 1872, 7 Ir. C. L. 534; cp. *Birch v. Stephenson*, 1811, 3 Taun. 469). In all such cases, if the construction is in favour of liquidated damages, which, by the way, will be a question for a jury (*Aldridge v. Howard*, 1842, 4 Man. & G. 921), no injunction to restrain the doing of the act will as a rule be allowed (*Woodward v. Gyles*, 1690, 2 Vern. 119). On the other hand, if the construction is in favour of a penalty, an injunction may be claimed (*Bray v. Fogarty*, 1870, 4 Ir. Eq. 544). And in general, where a party not only stipulates to pay an increased rent, but also to forfeit his interest, the sum payable will be a penalty (*French v. Macale*, 1842, 2 Dr. & War. 269). In some cases, when the breach of the covenant ceases the penalty will also be held to cease to be payable (*Domville v. Forde*, *supra*). But if the agreement shows that the additional rent is to remain payable until the end of the term, that construction will be enforced (*Birch v. Stephenson*, *supra*). Should a jury pass over the stipulation *nomine pœnæ*, and merely find for the actual damage sustained, it will be ground for a new trial (*Farrant v. Olmius*, 1820, 3 Barn. & Ald. 692). See PENALTY.

Non-appearance.—See DEFAULT.

Non assumpsit.—This was the plea of the general issue in the old action of *assumpsit* (see ASSUMPSIT; GENERAL ISSUE). It was a direct

denial of the promise, agreement, or undertaking averred in the declaration, the form of plea being that the defendant did not undertake or promise as in the declaration alleged (1 Chitty on *Pleading*, 7th ed., p. 492).

Prior to the coming into operation of the pleading rules of Hilary Term, 1834, this plea was of a very comprehensive nature. It put in issue every allegation in the declaration, and the defendant was able to raise thereunder every defence which showed that the promise was void or voidable, or that it had been performed (*ibid.*). Owing to the inconvenience that resulted in practice from thus generally denying the defendant's liability, and leaving the particular questions in dispute to appear for the first time by the evidence, it was provided by the above-mentioned rules that in all actions of *assumpsit* (except on bills of exchange and promissory notes, as to which it was made inadmissible), the plea of *non assumpsit* should operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise might be implied by law, and that in every action of *assumpsit* all matters in confession and avoidance should be pleaded specially (see *Regulæ Generales*, 4 Will. iv. 1834, I. *Assumpsit*, and the instances there given of the effect of the plea in various causes of action in *assumpsit*). The effect of this alteration was to deprive the plea of *non assumpsit* somewhat of its character of a general issue, and to render it rather a traverse of the most essential allegation in the declaration (Bullen and Leake's *Precedents of Pleadings*, 3rd ed., p. 460).

After the passing of the Common Law Procedure Act, 1852, the above-mentioned provisions were substantially re-enacted by the Rules of Trinity Term, 1853, with the exception that the plea of *non assumpsit* was made inadmissible to causes of action to which the plea of "never was indebted" (see NUNQUAM INDEBITATUS) was applicable, as provided in Sched. B. (36) of the Common Law Procedure Act, 1852. The practical effect of this was that the plea of *non assumpsit* became restricted in use to special counts in *assumpsit* (*Regulæ Generales*, Trinity Term, 1853, rr. 6, 7, 8; Stephen on *Pleading*, 7th ed., p. 160; Bullen and Leake's *Precedents of Pleadings*, 3rd ed., p. 465).

The effect of the Rules of the Supreme Court, 1883, is to still further deprive a defence which is a denial or traverse of the promise, contract, or agreement alleged in the plaintiff's pleading, of its ancient character of a general issue, covering a variety of defences; for by Order 19, r. 20, when a contract, promise, or agreement is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the same may be implied by law, and not as a denial of the legality or sufficiency in law of such contract, promise, or agreement, whether with reference to the Statute of Frauds or otherwise (see Bullen and Leake's *Precedents of Pleadings*, 5th ed., p. 549).

Non-business Days.—See BUSINESS DAY.

Non-combatants.—See BELLIGERENT; WAR.

Non compos mentis.—See LUNACY.

Nonconformist.—A Nonconformist is one who is not in communion with the Established Church of England (as to the sense in which the term “established” is properly applicable to the Church of England, see vol. iii. at p. 12) or (in Scotland) of Scotland. A Nonconformist may therefore be an atheist (*vide* BLASPHEMY), a Roman Catholic (*vide* ROMAN CATHOLIC), or a Protestant (*vide* PROTESTANT), or other Dissenter from the Established Church. It has been decided, for instance, that Lutherans (*R. v. Hube*, 1791, Pea. N. P. C. 180; 2 R. R. 669) and French Protestant refugees (*A.-G. v. Dangars*, 1864, 33 Beav. 621) are Protestant Dissenters. The term “Nonconformist” is now used, as a rule, as synonymous with “Protestant Dissenter,” a term which does not seem to have come into general use till after the Toleration Act of 1688. Yet Dissenters are still occasionally distinguished from Nonconformists as being persons who not only dissent from the National Church, as it is actually constituted, but disagree with the principle of National or State churches (see Murray’s *Dictionary*, *passim*), while in Wales the term “Dissenters” is popularly applied exclusively to the Independents or Congregationalists, the oldest Nonconformist body in the Principality. It seems probable, though it is a matter of controversy, that the early “Nonconformists,” whether Roman Catholic (*e.g.* Gardiner’s *History of England*, vol. i. 108) or Puritan (Hallam, *Const. Hist.* ch. iv. p. 159, ed. 1871), outwardly conformed to the Established Church. Gradually the laws became more severe against Nonconformists. An Act of Uniformity (1 Eliz. c. 2, incorporating 5 & 6 Edw. vi., which again incorporated 2 & 3 Edw. vi.) and an Act of Supremacy (1 Eliz. c. 1) were passed in the first year of the reign of Elizabeth, which immediately drove about a hundred dignitaries and eighty parochial priests with papal sympathies from their benefices (Hallam, *Const. Hist.* ch. iii.). In 1567 we find the first instance of actual punishment inflicted on Protestant Dissenters, when a number of them were seized in a conventicle and sent to prison (*vide* Hallam, *Const. Hist.* ch. iii.). By 23 Eliz. c. 1, the penalties imposed by 1 Eliz. c. 2 for non-attendance at the parish church were increased, and in 1583 over two hundred ministers were suspended for refusing to subscribe to the Queen’s supremacy, the lawfulness of the common prayer and ordination service, and the truth of the whole Thirty-nine Articles (Neal, *History of the Puritans*, 245).

By 35 Eliz. c. 1, and 3 Jac. i. c. 4, still severer penalties were inflicted on Nonconformists, and in 1604 three hundred Nonconformist ministers were ejected from their livings (Gardiner, *History of England*, vol. i. 197).

By 13 & 14 Car. ii. (Act of Uniformity, 1662) it was enacted that every beneficed minister, fellow of a college, and schoolmaster should declare his unfeigned assent and consent to all and every thing contained in the book of common prayer, and that no person, not episcopally ordained, should presume to administer the holy sacrament of the Lord’s Supper, under penalty of £100. Over two thousand clergymen refused to conform or to submit to episcopal ordination, and resigned their benefices. Other penal laws against Nonconformists were passed in the reign of Charles ii. (13 Car. ii. st. 2, c. 1 (see Corporation Act), 16 & 22 Car. ii. (see Conventicle Act), 17 Car. ii. c. 2 (see Five Mile Act), and 25 Car. ii. c. 2 (see Test Act)), which have been subsequently repealed.

At common law nonconformity has never been, and is not, a crime, and Nonconformists are subject to no penalties or disabilities. In a layman nonconformity is now not even an ecclesiastical offence (*vide* BLASPHEMY), and a Nonconformist can hold minor offices in the Church, such as that of

churchwarden, except in new parishes constituted under 1 & 2 Will. IV. c. 38; 6 & 7 Vict. c. 37; or 19 & 20 Vict. c. 104 (*vide* CHURCHWARDEN). A clergyman of the Established Church cannot refuse to baptize a Nonconformist or the child of a Nonconformist; and baptism by a layman or Nonconformist is recognised as valid, though irregular (*vide* BAPTISM; Phillimore, *Eccl. Law*, 494; *Kemp v. Wickes*, 1809, 3 Phillim. at p. 276). A clergyman cannot refuse to bury or marry a Nonconformist who has been validly baptized (*vide* CHURCH OF ENGLAND), and a Protestant Dissenter may present to a living.

All Nonconformists, irrespective of their religious or want of religious belief, are eligible to be elected to every office of State (though there is still a statutory objection to a JEW or (*semble*) a ROMAN CATHOLIC becoming Lord Chancellor (10 Geo. IV. c. 7), and the sovereign and the sovereign's wife must be members of the Established Church (*vide* ACT OF SETTLEMENT, 12 & 13 Will. & Mary, 1701)). Every Nonconformist may become a member of either House of Parliament. Since 1727 the "three associated denominations," viz. the Presbyterians, Independents, and Baptists, enjoy the privilege of approaching the sovereign on the throne. Since 17 & 18 Vict. c. 125, s. 20, and 24 & 25 Vict. c. 66, s. 1, all persons who object to give their evidence on oath in civil or criminal matters can do so on affirmation. All that the common law enjoins is that nothing shall be done "to the disherison of the Crown or the propagation of a false religion" (*R. v. Portington*, 1692, 1 Salk. 162). At one period gifts in favour of Nonconformists (including Protestant Dissenters, Roman Catholics, and Jews) were held to be invalid, under the law against superstitious uses (1 Edw. VI. c. 14; *A.-G. v. Baxter*, 1684, 1 Vern. 248; *A.-G. v. Whorwood*, 1750, 1 Ves. Sen. at 537; *De Costa v. De Paz*, 1745, cited at 2 Swans. 487 n.); but the Courts have now upheld bequests to all kinds of Nonconformists, including Unitarians (*Shrewsbury v. Hornby*, 1846, 5 Hare, 406; *In re Barnett*, 1860, 29 L. J. Ch. 871), and Irvingites and Methodists (*Dawson v. Small*, 1874, L. R. 18 Eq. 114; *A.-G. v. Lawes*, 1849, 8 Hare, 32; *A.-G. v. Pearson*, 1817, 3 Mer. 353). Bequests for the distribution of the works of Joanna Southcote, and Robert Owen, the Socialist, have also been enforced, though a legacy to establish a prize for an essay on "The Sufficiency of Natural Theology treated as a Science," and a bequest for performance of religious ceremonies to testatrix's late husband and herself, have been held to be void (*Briggs v. Hartley*, 1850, 19 L. J. Ch. 416; *Yeap Cheah Neo v. Ong Cheng Neo*, 1875, L. R. 6 P. C. p. 396).

The Church of England still holds, however, a more favoured position before the law in some respects. A charity for "the worship of God" is *prima facie* a charity for the benefit of the established religion (*A.-G. v. Pearson, supra*). The Court takes judicial notice of the tenets and authorities of the Established Church, while any question of Nonconformist doctrine, usage, and regulations must be proved in evidence in the ordinary way. Though in England and Wales the right of the Church of England to ecclesiastical tithes reserved in the Toleration Act was expressly reserved by 31 & 32 Vict. c. 109, compulsory church rates were abolished, except (1) where the rate is partly used for other than church purposes; (2) where there is a money charge on the church rate, such rate must be paid till the charge is cleared; and (3) where the rate had been levied under a local Act in extinguishment of tithes, or upon contract for good consideration (*Bell v. Bassett*, 1882, 52 L. J. Q. B. 22). See RATES (CHURCH). Dissenters are also in a different position from members of the Church of England in regard to burials and marriage (*vide infra*).

Relieving Statutes.—(1) The first great measure of relief to Protestant Dissenters was the Toleration Act, 1688 (1 Will. & Mary, c. 18), which exempted from the penalties of existing statutes against separate conventicles, or absence from the established worship (1 Eliz. c. 2; 23 Eliz. c. 1; 29 Eliz. c. 6; 3 Jac. c. 4; 3 Jac. c. 5; *vide supra*), such as should take the oaths of allegiance and supremacy, and subscribe the declaration against popery provided in the Act, and such ministers as should, in addition, subscribe the 39 Articles of the Church of England (except the 34th, 35th, and 36th, and certain words in the 20th), should not be liable to the penalties imposed by the Statutes 13 & 14 Car. II. c. 4; 17 Car. II. c. 2, and 22 Car. II. c. 1. Quakers were allowed to affirm, and Baptist ministers were relieved from subscribing the 27th Article relating to Baptism. This indulgence, however, was extended to Dissenters, subject to the condition that their meeting-houses should be registered in the Bishop's Court or in the Court of Quarter Sessions, and was expressly restricted to Protestant Dissenters who believed in the Trinity. The Toleration Act therefore applied, at the time of its passing, to four main dissenting denominations—the Presbyterians, the Independents (or, as they were beginning to be called, after the American fashion, the Congregationalists), the Baptists, and the Quakers. In course of time new denominations arose, which claimed and received the benefits of the provisions of the Toleration Act, *e.g.* the Lutherans, the French Protestants, the Wesleyans, the Welsh Calvinistic Methodists, the Bible Christians, the Primitive Methodists, the Separatists, etc. Indeed, the provision requiring the registration of chapels contained in the Act had a very material influence on the development of at least two powerful Nonconformist bodies. For it is not improbable that, if the chapels of the Wesleyans and the Welsh Calvinistic Methodists had come within the protection of the law without having to be registered as dissenting meeting-houses, the Wesleyans and the Welsh Methodists would have continued within the fold of the Established Church (*vide* Burn's *Eccl. Law*, ed. 1763, art. "Dissenters"; Thomas Charles' *Welsh Methodists Vindicated*, 1802). It should also be noted that the Protestant Dissenters were required by the Toleration Act to take the oath of supremacy, which was totally opposed to the teachings of Cartwright and the earlier Nonconformists of Elizabeth's reign (Neal's *History of the Puritans*, i. 88).

(2) By the Dissenting Ministers Act, 1779 (19 Geo. III. c. 44), Protestant Nonconformist ministers making a declaration that they were Christians were relieved from the limited subscription to the 39 Articles which was required by the Toleration Act. On the same terms all Dissenters were exempted from the restrictions which previously existed on teaching, though they were not repealed till 9 & 10 Vict. c. 59 (1846).

(3) 52 Geo. III. c. 155 (repealing 13 & 14 Car. II. c. 1, and 17 Car. II. c. 2 and 22 Car. II. c. 1, *vide supra*) relieved Protestant Dissenters from the remaining oaths and from the declaration required by 19 Geo. III. c. 44. It also enacted that "no congregation of more than twenty besides the family shall be allowed unless certified as the existing law required or in the manner mentioned in the Act." But every teacher had to take the oaths and declaration according to the Dissenting Ministers Act, 1779, under a penalty of from 10s. to £10, if required by a justice of the peace. The Act did not apply to Quakers, so that they still had to be exempted under the Toleration Act, and were not, presumably, subject to the penalties imposed by 52 Geo. III. c. 155.

(4) In the following year an Act (53 Geo. III. c. 160) was passed to relieve the Unitarians by repealing the exception of anti-Trinitarians from the

benefits of the Toleration Act, as well as the provisions against them in the Act of 9 & 10 Will. III. "for the suppression of blasphemy and profaneness."

(5) In 1828 the Test and Corporation Acts (*vide supra*) were repealed.

(6) 7 & 8 Vict. c. 102 and 9 & 10 Vict. c. 59 swept away all the statutes (other than the Toleration Act and 52 Geo. III. c. 155) which restricted the right of assembling for religious worship.

(7) 18 & 19 Vict. c. 86 enacted that nothing in the Toleration Act or 52 Geo. III. should apply—(a) to a congregation in a private dwelling-house, or (b) to a congregation meeting occasionally in a building not usually appropriated to purposes of worship.

(8) The Toleration Act was repealed by 34 & 35 Vict. c. 48, s. 1, Sched. 2, except such parts as (a) enumerate the offices from which dissenting ministers are entitled to exemption (s. 11); (b) enable Dissenters to act as churchwardens by deputy (s. 7); and (c) provide for the punishment of disturbers of religious meetings tolerated by the Act (s. 8). Dissenters are also relieved from all oaths and declarations other than the declaration set out in 19 Geo. III. c. 44.

(9) The Statute Law Revision Act, 1873, repealed 19 Geo. III. c. 44; 52 Geo. III. c. 155; and 53 Geo. III. c. 160; and therefore, at the present day, Unitarians occupy precisely the same position in the eye of the law as the other Protestant Dissenting communities. Quakers, however, occupy a slightly different position to the other Dissenters, because the Act 52 Geo. III. was not made to refer to them. Sec. 11 of the last-mentioned statute enacts that the doors of any assembly of Protestant Dissenters must not be locked or barred so as to prevent entry, and any person preaching at an assembly where they are so locked in is subjected to a penalty not exceeding £20, and not less than 40s. for each offence. It would appear that Quakers are not liable to this penalty. Again, though it is said in the preamble of 18 & 19 Vict. c. 81 that "it is expedient that all places of religious worship should—if the congregation should desire, *but not otherwise*—be certified by the Registrar-General," it is still important that a dissenting meeting-place should be so registered (*vide infra*). It does not appear, however, that Quakers are bound in the same way to register their places of meeting in order to avoid the penalties imposed by 52 Geo. III. (*Winslow's Law of Nonconformists*, pp. 5, 6).

Nonconformist Ministers.—The prefix "Reverend" is not a title of honour exclusively belonging to the clergy of the Church of England (*Keet v. Smith*, 1876, L. R. 1 P. D. at p. 75), and can be applied to Nonconformist ministers, as it was applied in the fifteenth and sixteenth century to distinguished laymen. The regular minister of a chapel certified under 18 & 19 Vict. is exempt from serving on a jury (33 & 34 Vict. c. 77, s. 9, and schedule), from being appointed to a parochial office such as churchwarden or overseer (1 Will. & Mary, sess. I, c. 18, s. 11), from being balloted to serve in the militia (19 Geo. III. c. 44, s. 1; 52 Geo. III. c. 155, ss. 5–9—such a minister is exempt though he be engaged in trade, *Kenward v. Knowles*, 1744, Willes, 463). No toll can be demanded or taken on any turnpike road from a minister or any person going to or returning from his usual place of religious worship tolerated by law, on Sundays, or on any day on which divine service is by authority ordered to be celebrated (3 Geo. IV. c. 126, s. 32); and it has been held that a Primitive Methodist minister was exempt from toll when going to the chapel assigned to him by the Connexional plan, though he was not in the habit of ministering at that chapel every Sunday (*Smith v. Barnett*, 1870, L. R. 6 Q. B. 34); but the exemption must be claimed at the time. Guardians of the poor may appoint and pay a

Nonconformist minister for the purpose of attending to the spiritual wants of Nonconformist paupers (*R. v. Haslehurst*, 1884, 53 L. J. M. C. 127); but by the Municipal Corporation Act, 1882, a regular minister, though presumably not a lay or occasional preacher or a minister who is not in charge of a church (*R. v. Oldham*, 1869, 38 L. J. Q. B. 125), is disqualified from acting as town councillor, auditor, or revising assessor. A regular minister, however, is eligible for election as a member of a school board, board of guardians, and district council, county council, or Parliament, and he can be appointed justice of the peace. A preacher or minister is not to be disturbed in the conduct of religious worship, or in the performance of his duty in the lawful burial of the dead in any churchyard or other burial-place (24 & 25 Vict. c. 100, s. 36); and he is, at such times, exempt from arrest upon any civil process. The minister of a dissenting chapel must be appointed in the manner indicated in the trust deed. If the trust deed contains no instructions as to the mode of appointment, then he must be appointed according to the usage of the congregation, though such usage must not be held to be necessarily conclusive (*A.-G. v. Pearson*, 1817, 3 Mer. 353, at p. 403; 17 R. R. 100). The election must be made only by the competent (*Perry v. Shipway*, 1859, 1 Gif. 1), and the Court may direct an inquiry to be held as to who are so competent, or as to usage (*Davis v. Jenkins*, 1815, 3 Ves. & Bea. 151, 155, 159; 13 R. R. 168). If the trust deed enjoins that the minister should be elected by the congregation, an election by the majority is valid (*Davis v. Jenkins, supra*); or if by the trustees, then a minister can be validly elected by the majority of the trustees (*A.-G. v. Lawson*, 1866, W. N. 343), though in that case he cannot maintain an action for arrears of salary against all the trustees (*Cooper v. Whitehouse*, 1834, 6 Car. & P. 545). Hirsers of pews, who are not regular members, are not competent to take part in the election of the minister (*Leslie v. Birnie*, 1826, 2 Russ. 114; 26 R. R. 14). The Court will grant a *mandamus* to admit a newly-elected minister (*R. v. Barker*, 3 Burr. 1265), but not to restore a minister, unless he shows a *prima facie* title (*R. v. Jotham*, 1790, 3 T. R. 575-577; 1 R. R. 770). At law a minister is only a tenant-at-will to the trustees of a chapel (*Doe d. Jones v. Jones*, 1830, 10 Barn. & Cress. 718), but he is not a trespasser if he returns to fetch his goods from a chapel whence he has been evicted without notice (*Doe d. Nicholl v. M'Kaeg*, 1830, 10 Barn. & Cress. 721). Equity will continue a minister, who is not acting improperly, in possession pending an action as to the validity of his appointment, and the Court will pay his salary (*Foley v. Wontner*, 1820, 2 Jac. & W. 245, at p. 247; 22 R. R. 110); but not in case of improper conduct (*Spurgin v. White*, 1860, 2 Gif. 473), or breach of trust (*Brown v. Summers*, 1840, 11 Sim. 353; *A.-G. v. Welsh*, 1845, 4 Hare, 572). The Court will also grant an interim injunction to restrain an improper election, but will not grant an injunction to restrain the user of the premises by persons who have not been duly licensed (*Milligan v. Mitchell*, 1833, 1 Myl. & K. 446). Ministers hold office, not for life, but according to usage, though the leaning of the Court would appear to be strongly in favour of a tenancy for life (*vide* Ld. Eldon's judgment in *A.-G. v. Pearson, supra*; *Cooper v. Gordon*, 1869, L. R. 8 Eq. 249). Where a minister is dependent on the voluntary contributions of his congregation, he is, in the absence of other usage or instructions or contract, removable at will (*Porter v. Clarke*, 1829, 2 Sim. 520; 29 R. R. 158). Notice of any charges against a minister must be given to him before they are brought to a meeting of the members (*Dean v. Bennett*, 1870, 39 L. J. Ch. 674). No reasons for the dismissal of a minister need be given; but if the reasons are given, it must be after an investigation of which he

has received notice. A minister who has ceased to hold the same views as his congregation may be removed (*A.-G. v. Munro*, 1860, 2 De G. & Sm. 122), and the Court will grant an injunction to restrain him from occupying the pulpit (*A.-G. v. Welsh*, *supra*); but it may be that if the minister preached the doctrines enjoined in the trust deed, though they were contrary to those believed in by the congregation, he could not on that account be removed (*vide infra*).

Dissenting Chapels or Meeting-houses.—The term “chapels” as applied to dissenting meeting-houses is of comparatively late origin. The earlier Protestant Nonconformists called their place of assembly by the term “meeting-house,” while their opponents called it a “conventicle.” “Chapel” was a term applied to the consecrated or unconsecrated meeting-house in connection with the Established Church, and was therefore properly used by the earlier Wesleyans and Welsh Methodists to denote their places of worship. The Baptists and Independents in Wales still call their places of assembly “meeting-houses,” while the Calvinistic Methodists, as a rule, call their meeting-houses “chapels”; but the distinction has been lost in England, where the term “meeting-house” seems to have gone out of use.

Under the Toleration Act (*vide supra*), all dissenting meeting-houses had to be certified to the bishop, archdeacon, or Quarter Sessions; by 15 & 16 Vict. c. 36, they had to be certified to the Registrar-General. Though by 18 & 19 Vict. c. 81, this certification is made permissive, and not compulsory (*vide supra*), certain important consequences are entailed upon certification. As to the difference in the status and privileges of the minister, *vide supra*, *sub tit.* “Ministers.” The occupier of a building certified as a dissenting chapel is exempt from the penalties under 52 Geo. III. c. 155; the building itself is exempted from rates by 3 & 4 Will. IV. c. 30 (but if a concert is held, where a charge for admission is made, the exemption may be imperilled); by the Highway Act, 1835 (5 & 6 Will. IV. c. 50), it is exempted from the highway rate; by 38 & 39 Vict. c. 55 (Public Health Act, 1875), the expenses of private improvements are not to be chargeable on a building used as a dissenting chapel, or on the minister; by 32 & 33 Vict. c. 40, the rating authorities may exempt Sunday and ragged schools from the incidence of rates (*Bell v. Crane*, 1873, L. R. 8 Q. B. 481); but by 18 & 19 Vict. c. 120 (Metropolitan Managements Act, 1856), the trustees of a chapel, as also the Established Church, are liable for paving expenses, etc. (*Wright v. Ingle*, 1885, 16 Q. B. D. 379; *Angell v. Vestry of Paddington*, 1868, L. R. 3 Q. B. 715); and chapels so certified are exempted from the operation of the Charitable Trusts Act, 1853, and the amending Acts, 18 & 19 Vict. c. 81, (*vide infra*), and a separate building certified under the last-mentioned Act may be registered for solemnising marriages therein (*vide infra*).

The Registrar-General is required to print periodically a list of certified chapels. In cases where a chapel has been disused for one year, the trustees are to give notice of such disuser, and the certificate of registration is thereupon to be cancelled. In cases where a chapel is rebuilt, the old certificate must be cancelled, and the chapel must be re-registered.

Nonconformist Marriages.—Nonconformists may have their marriages celebrated under a registrar’s certificate in their own places of worship, and according to their own ceremonies, but certain notices have to be given and certain forms observed. A separate building certified under 18 & 19 Vict. c. 81 as a place of religious worship may be registered for solemnising marriages therein, on the application of any proprietor or trustee thereof to the superintendent-registrar of the district; but the fact that the building

has not been certified under 18 & 19 Vict. c. 81 does not affect the validity of the marriage, if the chapel has been registered by the superintendent-registrar. Forms in duplicate are delivered by the superintendent-registrar to the applicant, to be signed by at least twenty householders, stating that the building has been certified as a place of worship and has been used as such by the congregation desiring it to be registered during one whole year at least immediately preceding the registration. The duplicate certificate so signed must be countersigned by the proprietor or trustee applying for the registration, and must be delivered to the superintendent-registrar, who must forthwith send them to the Registrar-General. The Registrar-General will thereupon register the building for the solemnisation of marriages. The superintendent-registrar will then advertise the certificate of registration in a local newspaper and the *London Gazette*, on payment of £3 (6 & 7 Will. iv. c. 85, s. 18). On removal to a new building, the superintendent-registrar may substitute such new place for the old place; and on rebuilding a chapel, the old registry is cancelled and the certificate is renewed. The registry, however, is not cancelled if the chapel is only altered or enlarged.

A marriage can take place in a dissenting chapel by certificate with or without licence, after the consent of the minister or one of the deacons, trustees, or managers of the registered building has been obtained (19 & 20 Vict. c. 119). (1) If the marriage is by certificate without a licence, one of the parties must give notice in writing (19 & 20 Vict. c. 119, s. 3) to the superintendent-registrar of the district within which the parties have dwelt for not less than seven days; or, if living in different districts, then to the superintendent-registrar of each district wherein the parties reside (6 & 7 Will. iv. c. 85, s. 4). (2) But if the marriage is by certificate with licence, the same notice must be given, unless (a) the parties live in different districts, when notice to one superintendent-registrar is sufficient, and (b) the marriage is to be celebrated by licence.

Any person may enter a *caveat* with the superintendent-registrar against the granting of a certificate or licence. It is then the duty of the superintendent-registrar to inquire into the facts of the case, or refer the matter to the Registrar-General, and an appeal in all cases lies from the superintendent-registrar to the Registrar-General (6 & 7 Will. iv. c. 85, s. 13). A person who makes a false declaration before the superintendent-registrar is guilty of perjury (3 & 4 Will. iv. c. 72, s. 4; 19 & 20 Vict. c. 119, ss. 2, 18), and is liable, on the application of the Solicitor-General or Attorney-General, to the forfeiture of his property (19 & 20 Vict. c. 119, s. 19). It is felony to solemnise a marriage other than in the place named in the certificate, or without the presence of the registrar (6 & 7 Will. iv. c. 88). The certificate of the superintendent-registrar, or the certificates of the superintendent-registrars, must be delivered to the registrar present at the marriage, before the marriage can take place. The marriage can be celebrated either in a chapel or building registered for that purpose, or in the superintendent-registrar's office. The doors of the building should be open (6 & 7 Will. iv. c. 85, s. 20), though the breach of this regulation does not avoid the marriage (*Campbell v. Corley*, 1856, 4 W. R. 675); the ceremony should take place between 8 a.m. and 3 p.m., in the presence of some registrar of the district and two or more credible witnesses.

The marriage ceremony may be celebrated in any manner which the usage of the congregation or the wish of the minister or contracting parties may dictate. But two declarations given in 6 & 7 Will. iv. c. 85, are necessary; but by 7 Will. iv. and 1 Vict. c. 22, a Welsh translation of these declarations

has been authorised. Quaker marriages, which had long been allowed, were confirmed by 6 & 7 Will. iv. c. 85, s. 2, and such marriages may now be by licence (19 & 20 Vict. c. 119, s. 4).

Burials of Nonconformists.—By the common law every parishioner is entitled to be buried in the churchyard of his parish (*R. v. Coleridge*, 1831, 2 Barn. & Adol. 806), and for this purpose every person is a parishioner of the parish in which he dies (Com. Dig. "Cemetery" B). Prior to 1880, only the burial service of the Church of England, by an episcopally-ordained minister, could be used in a churchyard or consecrated ground (*Johnson v. Friend*, 1860, 6 Jur. N. S. 280). But by the Burial Law Amendment Act, 1880, a person can be buried with or without religious service; and any person, duly authorised by those in charge of the funeral, can take part in the burial service. But the churchwardens and incumbent have full power to refuse interment to any persons other than parishioners; and it may be that, as a condition of their assent to the burial of a non-parishioner, they could insist on the burial being conducted according to the rites of the Church of England.

The notice of intention to bury in accordance with the Act in either churchyard or consecrated parts of parochial cemeteries should be given, either to the incumbent or his substitute, or to the chaplain, by any relative, friend, or legal representative of deceased, not later than forty-eight hours prior to the interment. In the case of an indoor pauper, notice of burial must also be given to the master of the workhouse, or, in case of an outdoor pauper, to the clerk of the Guardians. The hours of burial are from 10 a.m. to 6 p.m. between April 1st and October 1st, and from 10 a.m. to 3 p.m. between October 1st and April 1st. The certificate, in the case of a burial in a churchyard, must be sent to the incumbent, or in case of a burial in a cemetery, to the clerk of the Burial Board. It has been decided that the tolling of the church or chapel bell is a part of the Church service, and that therefore a clergyman may legally refuse to allow it to be tolled in a burial under the Act of 1880.

With regard to cemeteries, the ground may be consecrated or unconsecrated. The whole ground may be consecrated, if a resolution to that effect is carried at a meeting of ratepayers; or if not, a portion of the burial-ground may be unconsecrated. A chapel belonging to the Established Church may be provided in the cemetery; but if that is done, a Nonconformist chapel must also be provided, unless a majority of the vestry or parish council, consisting of not less than three-fourths of the members, decide that it is unnecessary (18 & 19 Vict. c. 128, s. 14).

Nonconformists have the right of interment in all parts of the parochial cemetery, whether consecrated or not (15 & 16 Vict. c. 85), but they have to pay the ecclesiastical fees. Similarly, a clergyman of the Church of England, if he chooses, may use the burial service of that church, or such portion of it as can legally be used, when conducting a burial service in unconsecrated ground.

Education.—At common law, if a charitable endowment was purely eleemosynary, or where usage was in their favour, Dissenters could claim to participate in it, unless they were expressly excluded (*A.-G. v. Calvert*, 1857, 23 Beav. 248, per Lord Romilly. But see also Lord Hatherley in *In re Chelmsford Gr. Sch.*, 1855, 1 Kay & J. at p. 543). The only exception to this rule is in the case of a school connected with the National Society for Promoting the Education of the Poor in the Principles of the Church of England (Phill. *Eccles. Law*, 2nd ed., 1624). Prior to the University Tests Abolition Act of 1871 (see *passim*; 34 Vict. c. 26), the universities of Oxford, Cambridge, and Durham were closed to Dissenters. Nonconform-

ists can still not take the degrees of B.D. or D.D., or hold a Professorship of Divinity at these institutions, but they can pass the examinations in theology, and even examine in the Theological Final School. New colleges can be created which shall be confined to the members of a sect (*R. v. Hertford College*, 1878, 3 Q. B. D. 693).

Previous to the Endowed Schools Acts (32 & 33 Vict. c. 56; 36 & 37 Vict. c. 87 (see *passim*)), a good deal of uncertainty prevailed as to the position of Nonconformists in regard to endowed schools which had not been associated by the founder with any particular sect. The two points about which most uncertainty prevailed were the eligibility of Dissenters to act as trustees, and the right of the children of Dissenters to attend school without being compelled to attend the religious instruction imparted at the school. With regard to the former point, it was held that Nonconformists were eligible unless they were specially excluded (*A.-G. v. St. John's Hospital, Bath*, 1876, 2 Ch. D. 554). As to the rights of Dissenters' children, in one case their exclusion from religious instruction was left to the visitors and governors (*A.-G. v. Bishop of Worcester*, 1852, 9 Hare, at p. 367; see also *A.-G. v. Sherborne Sch.*, 1854, 18 Beav. 256; *A.-G. v. Clifton*, 1863, 32 Beav. 596).

By the Endowed Schools Act, 1869, (1) day scholars in day schools were exempted from religious education; (2) exemption from religious instruction was granted to day scholars in boarding schools, where such an exemption was desired prior to their entry at the school; (3) no "tests" were administered to a governor of a school (but the governing bodies of Quaker and Moravian schools were not to be disturbed without their consent); and (4) no "tests" were to be applied to the headmaster and his assistants.

But the Acts of 1869 and 36 & 37 Vict. c. 87 do not apply to any endowment applicable for educating ministers of any Church, or for teaching any particular profession, or to any school assisted out of such endowment; or to a school which for six months before 1st January 1869 was used solely for the education of choristers. Nor do the provisions of the 1869 Act (except as to day scholars) apply to (a) cathedral schools, (b) denominational schools, (c) educational endowments originally given to charitable uses since the Toleration Act, where, by the express terms of the trust deed, or by the regulations made during the lifetime of the founder, and within fifty years of his death, either the majority of the governors or of the electors or the principal teacher or the scholars must be members of a particular sect.

These Acts have been incorporated and extended in the Welsh Intermediate Education Act, 1889.

Gifts and Donations to Nonconformist Chapels must comply with the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42, incorporating and consolidating previous Mortmain Acts from 8 Geo. II. c. 36. See MORTMAIN). Every assurance of land to and for the benefit of a chapel or denomination, and every assurance of personal estate, is void unless (1) the assurance is irrevocable and without reservation; but this does not apply to a case where the grantor reserved the right of appointing the minister (*Grievies v. Case*, 1792, 2 Cox, 301; *Wickham v. Marquis of Bath*, 1865, L. R. 1 Eq. 17); (2) the conveyance is by deed executed in the presence of two attesting witnesses; (3) the conveyance is made for valuable consideration or twelve months before the grantor's death; (4) the assurance is enrolled in Chancery within six months of execution; and (5) in case of stock in the public funds, the transfer is completed six months before the death of the assurer.

Dispositions of land (except by will), but not leases of land, "*bonâ fide* made to a trustee or trustees on behalf of any society, etc., for the erection" of a chapel, are exempted from the Act (31 & 32 Vict. c. 44, applying to conveyances subsequent to 13th July 1868); but such dispositions are subject to two conditions: (1) the alienation must have been made for full and valuable consideration, and (2) each piece of land must not exceed two acres in extent. By 36 & 37 Vict. c. 50 (Places of Worship (Sites) Act, 1873), any person seised in fee-simple, fee-tail, or for life or lives, of or to any manor or lands of freehold tenure, or having a beneficial interest therein, or being in possession for the time being, "may grant, convey, or enfranchise by way of gift, sale, or exchange, in fee-simple or for any term of years, any quantity not exceeding one acre of such land, as a site for a church, chapel, meeting-house, or other place of divine worship, or for the residence of the minister, or for a burial-place," etc. The life tenant must, in such a case, get the person next entitled to join in the conveyance; but a parent, as the natural guardian, can concur for his infant son (*In re Marquis of Salisbury and Ecclesiastical Commissioners*, 1876, 2 Ch. D. 29). By 45 & 46 Vict. c. 21, the last-mentioned Act is extended to authorise corporations, and a life tenant where the next person entitled is unborn or unascertained, to make similar grants.

A bequest for the erection of a chapel is valid when the site has not to be purchased (*Jones v. Williams*, T. L. R. 14th April 1886); and, generally speaking, shares in companies, whether incorporated or unincorporated, are not within the Mortmain Act of 1888, although the property of the company may consist partly of land. (This does not extend to shares which, like the old shares of the New River Company, have themselves the quality of real estate.)

Trusts.—The jurisdiction of the Charity Commissioners extends to all charities in England and Wales for the benefit of Dissenters, Roman Catholics, and Jews, but certified chapels are exempted from the operation of the Charity Trusts Act, 1853, and the Amending Acts 18 & 19 Vict. c. 81. The exempted charities, however, can (s. 64) send any disputes as to any office, or the fitness or disqualification of any trustee or officer, or his election or removal, or generally in relation to the management of the charity, to the arbitration of the Commissioners, whose award shall be final, by a two-thirds vote of the members present at any special meeting duly convened by notice for the purpose. By 32 & 33 Vict. c. 110, s. 14, the Charity Commissioners are empowered, on the application of the trustees, to extend the Charity Trusts Act to places of worship. The Commissioners are empowered to inquire into the management of the charities, to oblige the trustees to render accounts, to advise the trustees on the administration of the trusts, to authorise the granting of leases, the making of improvements, the raising of money by mortgages, and the sale, exchange, or partition of lands. The Attorney-General, or any person authorised by him, is given a right of appeal from the order of the Commissioners appointing or removing a trustee. The appeal is, by petition, to the High Court (see Daniell, *Chancery Forms*, 2nd ed., p. 2035). Trusts can be enforced (1) by information filed in the name of the Attorney-General; (2) by action, where the relief desired does not concern administration of revenue; and (3) by petition to the Lord Chancellor, the Master of the Rolls, or to the Court of each.

The Courts have experienced great difficulty in administering chapel trusts because of the difficulty which was found in discovering their true and proper application. Where the terms of the original trust deed were

explicit as to the doctrines which were to be preached, and the form of church government which was to be observed in the chapel, no serious difficulty could of course arise, but in many cases the trust deed was either silent on these points or had been lost. It was held (*A.-G. v. Aust*, 1866, 13 L. T. N. S. 233) that where a congregation was divided as to doctrine, the chapel must go, not to the majority of the present congregation, but according to original trust deed. By the Dissenters' Chapels Act (7 & 8 Vict. c. 45) it was enacted that in cases where there was no express statement in the deed of foundation as to the particular doctrines for which a chapel was to be employed, twenty-five years' usage was to be conclusive. It has been decided that the words "Presbyterian" or "Dissenting Congregation" are too vague to take a case outside the Act, but the words "Presbyterian or Independent" occurring in the deed of foundation have been held to be sufficiently explicit. It has also been held that Unitarians, though they may be free to change their opinions at any time when they are convinced of their error, can yet have the benefit of twenty-five years' usage (*A.-G. v. Hutton*, 1844, 7 Ir. Eq. R. 612). Where a chapel has been established for one denomination, it is a breach of trust to convert it for the purposes of another form of worship (*Broom v. Summers*, 1840, 11 Sim. 353; *Dill v. Watson*, 1836, 2 Jones Ex. 49; *A.-G. v. Welsh*, 1844, 4 Hare, 572), though the trustees and all or some of the members may have assented to the conversion (*A.-G. v. Aust*, *supra*; *A.-G. v. Murdoch*, 1849, 7 Hare, 445; see Lord Eldon, *A.-G. v. Pearson*, 1817, 3 Mer. at pp. 400, 418, 419; 17 R. R. 100). A charity intended for Protestant Nonconformists can be applied to the benefit of no one else (*A.-G. v. Murdoch*, *supra*), and an endowment intended for Trinitarians cannot be applied to Unitarians (*Shore v. Wilson*, 1843, 9 Cl. & Fin. 355; *Drummond v. A.-G.*, 1842, 2 H. L. 837). Similarly, a charity intended for the Established Church of Scotland cannot be applied to the Free Church (*A.-G. v. Walsh*, 1888, 4 Hare, 572), nor can one intended for the Independents be used for the benefit of the Presbyterian Church of England (*A.-G. v. Anderson*, 1888, 57 L. J. Ch 543); but it has been held that there is no difference between the Baptists and the Particular Baptists, as each congregation is at liberty to regulate its own practice in the points which separate the two bodies (*A.-G. v. Gould*, 1860, 28 Beav. 485). Knight-Bruce, V.C., held (*A.-G. v. Murdoch*, *supra*) that a Nonconformist congregation could unanimously and with the concurrence of the trustees make new regulations for public worship, which should not be subversive of the original constitution. The dissentient minority of a congregation may, however, become bound by acquiescence (*Cairncross v. Lorimer*, 1860, 3 Macq. 827). But the Attorney-General would have the right to protect the charity (*Corporation of Newcastle v. A.-G.*, 1845, 12 Cl. & Fin. 402). But the majority of the congregation can only alter the laws, and make new ones, so far as may be consistent with the primary trusts (*Milligan v. Mitchell*, 1837, 3 Myl. & Cr. pp. 74, 83). The Court is to determine what those trusts are, and whether they are being carried out properly (*Newsome v. Flowers*, 1860, 10 W. R. 26). A trust left for one denomination which had ceased to exist will be applied *cy-près* for the benefit of another (e.g. French Protestant Refugees, *A.-G. v. Dangars*, 1864, 12 W. R. 363; London Gaelic Church, *A.-G. v. Stewart*, 1872, L. R. 14 Eq. 17).

Several Nonconformist denominations have learnt by experience the danger of leaving the form of the trust deed to be decided by each successive grantor, and have adopted "model deeds." Among them are the Bible Christians (date of Model Deed, 1863, superseding 1831), Methodist

New Connexion (1846), Primitive Methodists (1864, superseding 1830), Wesleyan Reformers or United Methodist Free Churches (1865, superseding 1840), Welsh Calvinistic Methodists (deed poll of 1826), and Wesleyan Methodists (Skircoat Model Deed of 1832). The General and Particular Baptists, the Independents or Congregationalists, and the Presbyterian Church of England have not adopted "model deeds."

Trustees.—The provisions contained in the instrument creating the trust with reference to the appointment and removal of trustees must always be observed. Where the instrument is silent on these points, or where any difficulty arises in following the procedure it directs, or otherwise, the Court of Chancery has always had jurisdiction, on an information filed for the purpose by the Attorney-General, to remove trustees who cannot or do not efficiently perform the duties of their office, even though they may have been guilty of no actual misconduct (*A.-G. v. Pearson, supra*), and others can be appointed in their stead (*A.-G. v. Clark*, 1839, 1 Beav. 467), if the old trustees, for example, entertain opinions which ought not to be preached (*A.-G. v. Murdoch, supra*; *Shore v. Wilson, supra*). Under Sir J. Romilly's Act (52 Geo. III. c. 101) the Court could on petition appoint new trustees, and remove any or all of the old trustees who had been guilty of a breach of trust. By 2 & 3 Will. IV. c. 57, when the trustees are dead, the Court may appoint new trustees. By the Trustee Act, 1850, s. 45, the Court may vest the property in the trustees of any charity (over which the Court would have jurisdiction upon suit being duly instituted), whether the trustees were appointed in the instrument, or by the decree of the Court, or by order on petition under any statute authorising the Court to make such an order. By the Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), the Charity Commissioners can appoint or remove trustees (though they cannot remove a trustee on the sole ground of his religious belief). By Sir Morton Peto's Act (13 & 14 Vict. c. 28), it is unnecessary that any conveyance of the property should be made to the new trustees. "Successors" are to be appointed as provided in the trust deed, or in a separate deed; if not, then "in such manner as shall be agreed upon by such congregation or society." In order to preserve evidence of the appointment of the new trustees, the Act requires that "every such appointment shall be made to appear by some deed under the hand and seal of the chairman for the time being of the meeting of the congregation or society, and shall be executed in the presence of such meeting, and attested by two witnesses" (s. 3). But (1) the Act does not apply to Wesleyan Methodists (*In re Houghton Chapel*, 1854, 23 L. T. 268); (2) it is doubtful if the new trustees acquire all the powers of the old trustees, or only the legal estate (Lewin on *Trusts*, 9th ed., p. 969); (3) by 32 & 33 Vict. c. 26, the provisions of the Act are extended to the case of burial-grounds; and (4) the Act does not make good a title which is defective under the Mortmain Act (*Bunting v. Sergeant*, 1878, 13 Ch. D. 330). By the Conveyancing and Law of Property Act, 1881, s. 31, if a trustee dies, the person nominated in the instrument, or if none such, the continuing trustees, or the personal representative of the last surviving or continuing trustee, may appoint the new trustee or trustees. The statute also enacted (1) that a declaration in the deed appointing the new trustee, or (2) in the deed discharging the old trustee, vesting the trust property, operates without any conveyance or assignment. By the Trustees' Appointment Act, 1890, s. 7, where, owing to the non-existence of a power in the trust deed authorising the meeting of the members to appoint new trustees, an appointment of new trustees is made by the

surviving trustee or trustees, or by the personal representative of the last trustee, such appointment may be made under Peto's Act.

The act of the majority of the trustees within the trust binds the minority (*Perry v. Shipway*, 1860, 1 Gif. 9; but see *Cooper v. Whitehouse supra*). The trustees can remove the minister when the legal estate is in them (*Doe d. Jones v. Jones, supra*), but the Court will prevent the arbitrary enforcement of this right (*A.-G. v. Pearson, supra*). Trustees can alienate or otherwise use the property in the interests of the charity. Under Romilly's Act the sanction of the Court to the sale could be obtained by petition; and as places of religious worship are exempt from the Charitable Trusts Act, 1853, the trustees can do this without the sanction of the Charity Commissioners. But it is cheaper to apply to the Charity Commissioners for power of sale, and the Commissioners can also sanction the raising of a mortgage on the property (16 & 17 Vict. c. 137; 18 & 19 Vict. c. 124).

See articles on ATHEISM; BAPTISM; BLASPHEMY; BURIAL; COMMON LAW; CHURCHWARDEN; CHARITIES; CONVENTICLE ACT; CHURCH OF ENGLAND; ENDOWED SCHOOLS; HERESY; MARRIAGE; MORTMAIN; MINISTER OF THE PROTESTANT TEST ACT; TOLERATION ACT; TRUSTS; ROYAL SUPREMACY OF PARLIAMENT; UNIFORMITY, ACTS OF.

[*Authorities.*—Hallam, *Const. Hist. of England*; Gardiner, *Hist. of England*; Froude, *Hist. of England*; Neal, *Hist. of the Puritans*; T. Charles, *Welsh Methodists Vindicated*; Phillimore, *Ecclesiastical Law*; Burns, *Ecclesiastical Law*, article "Dissenter"; Burns, *Law Dictionary*; Winslow, *Nonconformists*; Tudor, *Charitable Trusts*; Lewin, *Trusts*; Boyle, *Law of Charities*; *Legal Handbook for the Calvinistic Methodist Connexion*.]

None Effect.—See VOID AND OF NONE EFFECT.

Non est inventus.—This expression forms the proper return to be made by a sheriff to a writ commanding him to arrest a defendant when he is unable to do so owing to the defendant not being within his bailiwick. Technically, such a return is known as one of *non est inventus*. Sometimes the abbreviated form "N. E. I." is used, and sometimes the English equivalent "Not found," but it is better to retain the technical phrase, and "not to be found" is a bad return (*R. v. Kent (sheriff)*, 1837, 2 Mee. & W. 316). The omission to capture the defendant, however, must not have been due to any fault of the sheriff; for if so, he will be liable to attachment (*R. v. Kent (sheriff) supra*; *Saxton v. West*, 1794, 2 Anst. 479) but if the person to be arrested has not been seen in the county, that fact will excuse the sheriff's delay in making the return (*Saxton v. West, supra*). If, on the other hand, the person to be arrested was visible in the jurisdiction, a return of *non est inventus* would be improper, and render the sheriff liable (*North v. Miles*, 1808, 1 Camp. 389; *Beckford v. Montagu*, 1796, 2 Esp. 476). Upon a return of *non est inventus*, the person prosecuting the judgment or order becomes entitled, at his option, to a commission of sequestration or to an order for the serjeant-at-arms (see Order of 7th January 1870, rr. 6, 7, 8, in L. R. 5 Ch. xxxv.; cp. R. S. C. Order 44 r. 1; 2 Seton, 1572, No. 1); or if the writ issued from the Crown side of the Queen's Bench Division, he may have one or more writs issued tested on the return day of the previous writ (Crown Office Rules, 1886 r. 262).

Non-existing Person.—See *BILLS OF EXCHANGE*, vol. ii. p. 96.

Nonfeasance.—See *NEGLIGENCE*; *NEGLIGENT DRIVING*.

Non-intervention.—See *INTERVENTION*.

Non-intromittant Clause.—A clause in the charter of a borough by which it is exempted from the jurisdiction of the county justices (see 3 Steph. Com. 37; *R. v. Sainsbury*, 1791, 4 T. R. 451; 2 R. R. 433).

Non-joinder.—See *JOINDER OF CAUSES OF ACTION*; *PARTIES*.

Non obstante.—In olden times the papacy was accustomed *de plenitudine potestatis* to issue bulls "*non obstante* (notwithstanding) any law to the contrary," and in imitation of this practice the sovereigns of England began about the middle of the thirteenth century to claim a like favour with respect to secular documents. Henry II. was perhaps the first who did so, asserting as part of the royal prerogative the right to dispense with or suspend the laws of the realm in particular instances. Soon what was called the *non obstante* clause became common in statutes and letters patent, importing a licence from the Crown to do something which, apart from such licence, would have been contrary to law. Thus in 1391 the 15 Rich. II. authorised the king's exercise of this right with respect to the Statute of Provisors until the next Parliament, but so that the said statute be not repealed; and in 1413, when assent was given to the 1 Hen. v., the king reserved the right to dispense with the statute when he pleased. Frequent occasion for exercising the right was also found in respect to the Statutes of Mortmain, the royal licences enabling corporations to hold lands without the penalty of forfeiture; and in Henry VII.'s reign the judges decided that notwithstanding the statutes prohibiting grants of the office of sheriff for more than one year, the king might make a grant for life with a *non obstante*. Lord Coke justified the exercise of this prerogative upon the ground that it was beyond Parliament to take away the sovereign's right to the service of his subjects (*Calvin's case*, 1609, 7 Co. 14). At the same time, even in those days the right was frequently contested. Thus in 1444 it was expressly enacted in the 23 Hen. VI. c. 8, that the king should not dispense with it; and in Henry VII.'s reign it was decided that the king could not dispense with penalties imposed for acts that were *mala in se*, that is, prohibited by the common law, though he might do so in the case of acts that were *mala prohibita*, that is, forbidden by statute. The Act of 1588 against simony (31 Eliz. c. 6) also is so strong as even to bind the sovereign. The right seems, nevertheless, to have been repeatedly exercised during the sixteenth and seventeenth centuries, and, indeed, it was James II.'s determination to dispense with the disabilities imposed by the Test Act which led to the Revolution. It was finally and effectually demolished, however, by the Bill of Rights (1 Wm. & Mary, sess. 2, c. 2) in 1688, that statute enacting that for the future no dispensation by *non obstante* of or to any Act of Parliament or any part thereof shall be

allowed, but that the same shall be held void and of none effect except the Act itself permit such dispensation. So effectual was this provision, that in 1696 the 7 & 8 Wm. III. c. 37 (now repealed) enacted expressly that the Crown might at its own discretion grant licences to aliene or take in mortmain of whomsoever the tenements might be holden.

Non obstante veredicto.—See VERDICT.

Non omittas.—The full expression is *non omittas propter libertatem*, that is, do not omit on account of any liberty or franchise within your bailiwick. It is a clause usually inserted in all processes addressed to sheriffs, enabling them to enter and execute the sovereign's writs within liberties not within their jurisdiction. For, strictly speaking, the sheriff can only execute writs in his own county; and if he executes them elsewhere, his proceedings are liable to be set aside (*Hammond v. Taylor*, 1820, 3 Barn. & Ald. 408; *Devenege v. Dalby*, 1780, 1 Doug. 383). So, without a *non omittas* clause in the writ, an arrest within a liberty or franchise is irregular (*Adams v. Osbaldiston*, 1832, 3 Barn. & Adol. 489), though not bad as an arrest, and will expose the sheriff to an action at the instance of the lord or bailiff of the liberty (per Parke, J., in *Adams v. Osbaldiston*, *supra*, at p. 492; *Sparks v. Spink*, 1817, 7 Taun. 311; *Kirkpatrick v. Kelly*, 1781, 3 Doug. 30). If, therefore, his writ do not contain the clause, the sheriff ought to direct his mandate either to the lord or to the bailiff of the liberty, by whom the writ will be executed and returned. Thus a sheriff's officer making an arrest within the liberty of the Rolls, under a writ not backed by the Master of the Rolls, was held liable to attachment (*Ex parte Carpenter*, 1759, Dick. 334). On the other hand, with the clause the liberty becomes *pro hac vice* parcel of the sheriff's bailiwick, and the sheriff can enter and execute the writ within the liberty. If, however, the party to be arrested is within a gaol for his own purposes, he may be arrested there under a writ not containing the clause (*Loveitt v. Hill*, 1836, 4 Dowl. P. C. 579); and arrests may similarly be effected within Crown buildings, if the authorities do not object (*A.-G. v. Donaldson*, 1842, 10 Mee. & W. 117; *Bell v. Jacobs*, 1828, 4 Bing. 523; *Sparks v. Spink*, *supra*; *Winter v. Miles*, 1809, 10 East, 578). It should be noted that the ordinary form of writ of attachment does not contain a *non omittas* clause. (See Crown Office Rules, 1886, App. No. 190; but cp. R. S. C. 1883, App. H, No. 12.)

Non pros.—These words constitute an abbreviation for *non prosequitur*, that is, he does not follow up or prosecute. Judgment *non pros* was allowed to a defendant in an action at law when the plaintiff neglected to take any of the proper steps within the time prescribed by the practice of the Courts for the purpose. It differed in that respect from a *nolle prosequi* (*q.v.*), which was a kind of acknowledgment or undertaking to forbear going on with an action, the plaintiff being by a judgment *non pros* involuntarily put out of Court. A common exercise of the right was in the action of replevin, one condition of the bond signed in that action being to prosecute without delay. If, therefore, there was a want of due diligence on the part of the plaintiff in making his statement of complaint, and the defendant was unduly prejudiced in consequence, there was a breach of the condition in the bond sufficient to entitle the distrainer to sign judgment *non pros*

(*Gent v. Cutts*, 1847, 11 Q. B. R. 288). So, where the replevisor had allowed two years to elapse without taking any steps, the bond was held forfeited, and the obligee was allowed to recover, even though he had not signed judgment *non pros* (*Axford v. Perrett*, 1828, 4 Bing. 586). If, however, the default was due to the sheriff, the plaintiff's want of diligence would have been excused (*Harrison v. Wardle*, 1833, 5 Barn. & Adol. 146).

Now the practice in the High Court is regulated by the R. S. C. Order 27, r. 1 of which allows a defendant, in case the plaintiff makes default in putting in a statement of claim, to apply to have the action dismissed with costs for want of prosecution (see *Roberts v. Booth*, [1893] 1 Ch. 52; *Jones v. Macaulay*, [1891] 1 Q. B. 221). Default in delivering a reply or subsequent pleading, on the other hand, merely closes the pleadings, in which case, if the plaintiff does not give notice of trial, the defendant can either do so or move to dismiss the action (see Order 36, r. 12; *Ambroise v. Evelyn*, 1879, 11 Ch. D. 759). The steps to dismiss would be taken in the Queen's Bench Division by summons before a Master, and in the Chancery Division, either by summons in chambers or by motion in Court (see *Evelyn v. Evelyn*, 1879, 13 Ch. D. 138). Even at that stage, however, the plaintiff may undertake to go on (*Thomas v. Palin*, 1882, 21 Ch. D. 360). For the form of order to dismiss, see Order 27, r. 1, and Seton, p. 118.

In the County Courts, if a plaintiff wishes to discontinue his action, he ought to give notice in writing both to the registrar and to all the other parties to the action; in which case, on receipt of the notice, the latter may apply *ex parte* for an order for costs against the plaintiff (see County Court Rules, 1889, Order 9, r. 1; Order 12, r. 11 *a*). Otherwise, on the non-appearance of the plaintiff, the action will be struck out under sec. 88 of the County Courts Act, 1888 (51 & 52 Vict. c. 43).

Non residentia pro clerico regis.—The general canon law forbids a clergyman to hold secular offices and employment, on the ground that it would be base and sordid for such to seek temporal gain (*Otho. Athon.* p. 91). The sovereign, however, has always been accorded the privilege of employing either clergy or laity in any post of civil government, and, as a matter of fact, many clergymen have been chancellors, treasurers, and even justices of the King's Bench. Accordingly, in former times this writ was allowed to be issued to the bishop or ordinary, charging him not to molest a clergyman, employed in the royal service, on the score of non-residence (*Reg. Orig.* 58). This privilege is said to have rendered the constitution of the canon law practically nugatory. See also NON SOLVENDO PECUNIAM AD QUAM CLERICUS, ETC.

Non-sane Memory.—See LUNACY.

Non solvendo pecuniam ad quam clericus mulctatur pro non residentia.—The canon law insisted upon a regular personal residence of ecclesiastical persons on their cures, and made the desertion by a clergyman of his benefice, without just and necessary cause, and without the consent of the diocesan, a cause of deprivation, or of the infliction of penalties. In case the sovereign, however, appointed a clergyman to some secular office or employment,

as that of bailiff or beadle or the like, which necessitated non-residence, this writ was obtainable at the common law prohibiting the ordinary from exacting any pecuniary mulct or penalty imposed on a clergyman in the royal service for non-residence (*Reg. Writ.* 59). This was permitted even when the office was one which might have been executed by deputy, as, for example, that of expeditor to the Commissioners of Sewers (*Case of the Vicar of Dartford*, 1738, 2 Stra. 1107). Non-residence of the parochial clergy is now dealt with under the Pluralities Act, 1837, 1 & 2 Vict. c. 106, s. 32 of which enacts that if a spiritual person is absent without proper licence for more than three months in one year, he will forfeit a portion of the annual value of his benefice, the said portion being increased according to the length of absence. The bishop may, however, grant an exemption, as where the clergyman's house is unfit for residence, in which case sec. 12 of 48 & 49 Vict. (1884) c. 54, also applies. See PLURALITIES.

Nonsuit.—Under the former practice, a nonsuit was—in theory, at all events—the voluntary abandonment by a plaintiff of his suit. If a necessary piece of evidence was not forthcoming, or if the judge expressed a strong opinion adverse to him, or if for any other reason the plaintiff desired it, he could at any time before verdict withdraw his case from the jury, and so escape a judgment against him. No one could be nonsuited against his will. But if the plaintiff elected to be nonsuited, his counsel would so inform the judge, and the plaintiff's name was then called three times in open Court: "John Smith, come into Court or you will be nonsuited." If the plaintiff did not respond to this summons, he was nonsuited; the jury was discharged; the plaintiff had to pay the defendant's costs, but he was at liberty to bring another action subsequently for the same cause, if he thought fit.

The Judicature Act of 1873 and the Rules and Orders of 1875 did not at once abolish nonsuits; but they destroyed the only advantage which a plaintiff could derive from being nonsuited instead of having judgment recorded against him. The former Order 41, r. 6, of 1875 provided that a judgment of nonsuit should "have the same effect as a judgment on the merits for the defendant," *i.e.* no second action can be brought for the same cause of action. And now that rule is repealed, and the word "nonsuit" is nowhere to be found in the present Rules and Orders. The judge must at or after the trial direct judgment to be entered for one party or the other (Order 36, r. 39), and the matter being thus *res judicata*, cannot be reopened—at all events, without leave (*Fox v. Star Newspaper Co.*, [1898] 1 Q. B. 636; 78 L. T. 311; and see ABANDONMENT OF ACTION, vol. i. p. 14).

Hence now there is strictly no such thing as a nonsuit. But the word is still frequently used to describe the act of a judge when he withdraws the case from the jury and directs judgment to be entered for the defendant without (or in spite of) their verdict (see *Argent v. Donigan*, 1892, 8 T. L. R. 432; *Peters v. Perry & Co.*, 1894, 10 T. L. R. 366). The judge must hear the plaintiff's evidence; he cannot nonsuit on the opening of counsel, except by consent (*Fletcher v. L. & N.-W. Rwy. Co.*, [1892] 1 Q. B. 122). The proper time for the defendant's counsel to submit to the judge that there is no case for him to answer, is at the close of the plaintiff's case. Some judges, however, decline to allow the question to be argued at this stage of the action, unless defendant's counsel at once announces that he intends to call no witnesses. And, indeed, it is generally best to discuss the law of the case after all the evidence has been given. If the judge is then

of opinion that there is no evidence to go to the jury, he should stop the case (*Turner v. Bowley & Son*, 1896, 12 T. L. R. 402; *Hiddle v. National Fire, etc., Co. of New Zealand*, [1896] App. Cas. 372).

Non-user.—See **USER**.

Norfolk Island—Together with the neighbouring islets, was at one time united to Tasmania (*q.v.*). The Colonial Office List states that these islands are now under the government of New South Wales (see the Acts of the Imperial Parliament, 6 & 7 Vict. c. 35, and 32 & 33 Vict. c. 16).

Norman French.—At the time of the Conquest the language spoken by the masses of the Norman invaders was “probably a barbarous mixture of tongues not likely to have been put in writing or deemed capable of letters.” But the higher classes, the noble counts and sires, undoubtedly spoke French, and good French too, “for what our writers have carelessly called Norman French was the pure French of its day,” that is, the pure *Langue d’oil*, the source and origin of modern French, as distinguished from the *Langue d’oc*, which only survives as a local dialect.

It is true that the specimens which survive to us of the French of William the Conqueror and his companions vary much from modern French, but this variation is caused by the growth and development of French, and not by any peculiarity of dialect in the former language.

The opinion that the language used in the ancient statutes, State papers, and in the early proceedings of our Courts of law, was a dialect of French called Norman French, is probably due to authors who have copied from Polydore Vergil, who says of William the Conqueror: “*Leges quæ ab omnibus intelligi debent, erant ut etiam nunc sunt Normanicâ linguâ scriptæ, quæ neque Galli nec Angli recte callebant*” (Polydore Vergil, lib. ix. p. 154, Basel ed. of 1570).

These very laws, however, are still extant, having been preserved by Ingulphus, and first published by the learned Selden. They are entitled, “*Ces sont les Leis et les Custumes que le Reis Will, grentat a tut le peuple de Engleterre apres la conquest de la terre. Iceles mesmes que li Reis Edward sun cusin tint devant lui. Co est a saveir,*” etc. etc. La Combe, in his *Dictionnaire du Vieux Langage François*, vol. ii. p. xvi., compares the language of this document with that of a specimen of French of A.D. 1130, and says, “On croiroit que la *Langue* n’avait fait aucun progrès.” Thus showing that the language of William was practically identical with that of the earliest monuments of the French language.

Dugdale in his *Origines Juridicales* (c. xxxiv., “Pleadings in the French Tongue”) gives the following account of the use of French:—

These were first introduced here by King William the First, who, having made a full conquest of this realm, for better establishing thereof, thought it good policy utterly to abolish the English language, and instead thereof to plant the French, and therefore ordained that, not only the pleadings in Courts should be in that tongue, but that all children put to school should first learn French, and then Latine. But Fortescue (*de Laud. Leg. Angl.* c. 48) addeth another reason for the same, viz. that the French, becoming by that conquest masters here, might not be deceived in their accompts.

Which manner of pleading so continued, till by a statute law in 36 Edw. III. (c. 15), upon a petition of the Commons in Parliament, it was enacted by the king that pleadings in future should be in English, but enrolled in Latin,

But though the pleadings in French did then cease, the terms in that language (as being accounted more significant than others) were by that Act still continued; so also declarations upon original writs.

Blackstone takes a similar view, and adds—

The practicers, however, being used to the Norman language, and therefore imagining they could express their thoughts more aptly and concisely in that than any other, still continued to take their notes in law French; and, of course, when these notes came to be published, under the denomination of reports, they were printed in that barbarous dialect.

The real facts seem to be that the language of the Court and of polite intercourse was French, and that those who came to ask for the king's justice, naturally made their claim in that language, and with the extension of the jurisdiction of the king's law Courts, the juridical use of French extended also. Freeman (*Norman Conquest*, vol. v. p. 509) says it is "a dream, now perhaps pretty well got rid of, that William the Conqueror, or any other man, ever laid a deliberate plan to get rid of the English language."

As Luders puts it, "The French livery worn by our statutes and records seems to have had its beginning and end with Plantagenet." The Angevin kings brought with them a large extension of dominion in France to the English Crown, and also a large immigration of French nobles.

Henry II., Richard (a notable troubadour), John, and Edward I., all spoke French, though they probably understood English when spoken, as appears by a story told of Henry II., as occurring in 1172 A.D. Brompton (*Twysden Historia Anglicanæ Scriptores*, x. A.D. 1652, Brompton Col. 1079) says that the king was addressed by a species of apparition as follows: "Linguâ teutonicâ," that is to say in Saxon, "Gode olde kinge," followed by a warning as to his behaviour (Giraldus Cambrensis gives the words as "Gode houlde thi cuning"), "Rex autem gallicé illi militi qui suum frænum tenebat, 'Inquire a rustico illo au hæc sompniaverit, ac dum hoc Anglicé exponeret,' etc. etc.; so the king must have understood English when spoken, though he apparently required an interpreter to put his words into that language. Sir Frederick Pollock and Professor Maitland, in their *History of English Law*, vol. i. p. 62, suggest 1166, the year of the assize of novel disseisin, as "the fatal moment which irrevocably determined our legal language."

Every man dispossessed of his property could then come to the king's Court for justice, and for justice which was pleaded for and accorded in French. It was then that new forms of pleading and trial were introduced of which the names were French, *e.g.* Assise, Mortdauncester, etc.

From the Royal French-speaking Courts the use of French spread to the manorial Courts, and in the thirteenth century we find books of precedents of pleadings in those Courts written in French, one of which is printed as No. I. in the publication of the Selden Society, entitled "The Court Baron."

By 1390 A.D., about which time the Prologue to the *Canterbury Tales* was written, we find that the French of Paris and the French of Stratford-atté-Bow had considerably diverged from each other, probably by reason of the older forms surviving in England, as even at the present day archaic forms are inclined to survive in districts remote from the capital.

By the loss of the greater part of the French dominions of the English Crown in the time of Henry VI., the use of French in the ordinary affairs of life must have come into desuetude to a great extent, though probably not entirely, for, in the reign of Henry VIII., we find Sir Thomas More

satirically accusing the young courtiers of his time of speaking every language with a French accent, except French.

The legal use of French, however, held its own, in consequence of the reports of cases and the terms of art used in law being in French.

The first law book written in French which is known to us, is that entitled *Britton*; this work appeared about the year 1291. Its authorship is uncertain, but it claims to be given forth under the direct authority of King Edward I. The tract called "*Fet Assavoir*," which is usually printed immediately continuing *Fleta*, is another very early instance of a law book compiled in French.

Littleton's *Tenures*, 1481, was written in French, and the great *Abridgments*, by Nicholas Statham, temp. Edward IV., Sir Robert Brooke, and Sir Henry Rolle, were also in French; but in 1705 D'Anvers' *English Translation of Rolle* appeared, to be followed by Viner's *English Abridgment* in 1741.

The first instances of books about legal matters written in English are probably Sir John Fortescue's *Treatises on the Title to the Crown*, which were written in the time of Henry VI.

The first statute which has been alleged to have been in the French language is Magna Carta. D'Achery, in his *Spicilegium*, publishes a French version, which, in the opinion of Luders, is the original from which the Latin statute was translated. Be this, however, as it may, in the reign of Henry III. we certainly come to statutes in French. Luders asserts that in 43 Hen. III. (1358-59) there is a statute on the Patent Roll in French, this on Membrane 10, and is a proclamation of a statute directed to the several counties. Among the statutes at large the first in that language is 51 Hen. III. (1266), "*Statutum de Scaccario*." Again, in 3 Edw. I., the Statute of Westminster the First is in French, from which time till the end of the reign of Edward II. now French and now Latin is employed; while from the beginning of the reign of Edward III. to Richard III. French is always used, after which English becomes the language of the statute book.

The first use of English recorded on the rolls of Parliament is in 36 Edw. III., the year of the statute enacting that pleadings are to be in English, where the entry is: "*Au quel jour, esteantz nee Seignr le Roi, Prelatz, Countes, Barons, et les Comunes en la Chambre de Peinte . . . monstre en Anglois pur . . . de Grene, Chief Justice le Roi, les causes des somons du Parliament.*"

The forms of Royal assent or dissent to a statute were passed in 1509 in the present French forms: "*La Royne le veult*," "*Soit faict comme il est désiré*," "*La Royne s'advisera*." The form of assent to a money bill, although still in French, has been altered since 1509, and is now (as it was in 1705), "*La Royne remercie ses bons sujets, accepte leur benevolence et ainsi le veult*."

Letters missive began to be in French in the reign of Edward III., and so continued till 1417, after which they are in English.

The use of French, as the language in which proceedings in Courts of law were conducted, was expressed to be ended by the Statute 36 Edw. III. c. 15 (1362), by which all such proceedings were to be in English, but to be enrolled in Latin. There is no evidence, however, as to how far this statute was obeyed. The practitioners, however, had grown so used to the employment of French that they continued to take their notes in that language, so not only the Year Books from 20 Edw. I. (1292) to 36 Edw. III. (1362) are in French, but they continue to be in that language

up to the end, while the subsequent reporters down to the end of the seventeenth century continue to use French.

As might be expected, when French ceased to be a language in common use in England, the French of the law reports soon degenerated, and finally became a jargon, which has been called dog French. See further LAW REPORTING, vol. vii. at p. 324.

[*Authorities.*—Clifford, F., *History of Private Bill Legislation*; Dugdale, *Origines Juridicales*; La Combe, *Dictionnaire du Vieux Langage François*; Luders, A., *Essay on the Use of the French Language in our Ancient Laws and Acts of State*; Reeves, *History of the English Law*.]

North Borneo.—See LABUAN.

North Sea Convention.—A convention concluded May 6, 1882, between Great Britain, Belgium, Germany, Denmark, France, and Holland, for the purpose of “regulating the police of the fisheries of the North Sea outside territorial waters,” in which the right of fishery is exclusively reserved to the fishermen of each contracting country. The protected area extends three miles seawards from low-water mark along the whole extent of the coasts, as well as of the dependent islands and banks. For bays the distance of three miles is measured from a straight line drawn across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles. This does not, however, prejudice the free navigation and anchorage in territorial waters, provided they observe the special regulations of the power to which the shore belongs.

The Convention contains provisions for the registering and numbering of the boats belonging to each contracting country, and the rules to be followed in the fishing operations of adjacent vessels. It also grants powers to the cruisers of the contracting parties to authenticate all infractions and offences relating to fishing operations, and if any case appear, the traffic in spirituous liquors among the fishermen in the North Sea. The purchase by fishermen, and the sale or barter to fishermen while in the North Sea, of spirituous liquors, are forbidden (Art. II.). Supplying fishermen on the High Sea with provisions can only be done under a licence granted by the country to which the vessel belongs, and such vessel may not at any time have on board a quantity of spirits greater than is deemed requisite for the consumption of her crew (Art. III.). Arrangements are made under the Convention in each country for the summary punishment of all infractions thereunder. The Convention terminates on the expiry of one year’s notice given by any of the High Contracting Parties of its intention to withdraw from it.

North-Western Provinces.—See BRITISH INDIA.

North-West Territories.—See CANADA.

Notaires under French institutions do not correspond to the notary public under English law. Protests, for instance, are made in France by *huissiers* (*q.v.*), who also do all “noting” (*constatation*) of facts.

The *notaire*, on the other hand, has under French practice almost the monopoly of conveyancing, and it is he who takes the place of the family solicitor.

Notary; Notary Public.—1. "The general functions of a notary consist in receiving all acts and contracts which must, or are wished to, be clothed with an authentic form; in conferring on such acts the required authenticity; in establishing their date; in preserving originals or minutes of them, which, when prepared in the style and with the seal of the notary, obtain the name of original acts; and in giving authentic copies of such acts." The office of a notary is thus described by the only English text-writer upon the subject (Brooke, 3rd ed., p. 12), but the description more accurately applies abroad than in England. By commercial usage, now embodied in the law, the intervention of a notary is in some cases necessary, and in others advantageous, in the proceedings consequent upon the dishonour of a bill of exchange (see *PROTEST*). He may also act in the preparation of wills and contracts and other documents for the parties, but this work is far more commonly performed by a solicitor. In continental countries the notary occupies a more important position. He is resorted to whenever a solemn record of a transaction is desired; and a formal statement of any transaction stated to have been done before him, sealed with his notarial seal, is, it is believed, regularly accepted as the proper evidence of the transaction (cp. below, 3). It follows from this practice that the seal and certificate of a notary in England is often desirable to authenticate a document, or to record an event, where the document is to be used, or the event relied on abroad. The chief business in England of a notary consists in noting and protesting bills of exchange (see *PROTEST*), certifying acts of honour (see *HONOUR*), and in authenticating and certifying copies of documents and preparing and attesting instruments going abroad. A power of attorney, for example, intended to be acted upon abroad, is usually acknowledged by an attesting witness before a notary, and a "notarial act" is drawn up embodying a copy of the power. Further, English merchants frequently accept a notarial act or certificate, whether that of an English or a foreign notary, as sufficient evidence of something done at a distant place, in cases where it has no legal validity (see *PROTEST*, *Ship*). The notary is thus "a sort of international officer" (Brooke).

2. A *notarial act* consists of three parts: first, the title, statement of the time and place, and the name of the notary and witnesses; secondly, the stipulation or other transaction which is the subject of the act, for example, a copy of a power of attorney executed or acknowledged before the notary; and, thirdly, a statement that the act has been read to the parties and approved and signed by them, and of the notary's signature and seal (Brooke, p. 46).

It is the duty of a notary to keep a record of the transactions in which he is employed. The protesting and noting of bills of exchange, for instance, ought to be entered in his noting-book.

3. English Courts do not, in general, take judicial notice of a notary's seal, or accept a notarial certificate as evidence of the facts certified (*Earl's Trusts*, 1858, 4 Kay & J. 300; Taylor on *Evidence*, 9th ed., p. 9; Brooke appears to suggest the contrary, 3rd ed., p. 48). "According to the law of England, the mere production of a certificate of a notary public, stating that a deed had been executed before him, would not in any way dispense with the proper evidence of the execution of the deed," even

though the execution took place in a country where the local law was otherwise (per Lord Cairns in *Nye v. Macdonald*, 1870, L. R. 3 P. C. at p. 343). But all examinations, affidavits, declarations, affirmations, and attestations of honour in causes or matters depending in the High Court, and also acknowledgments required for the purpose of enrolling any deed in the Central Office, may be sworn or taken, in Scotland, Ireland, the Channel Islands, or any colony or foreign country, before any judge, Court, or notary public, or person there authorised to administer oaths, or before any British consul or vice-consul; and judicial notice is to be taken of the seal or signature of the judge, notary, or other person aforesaid attached to such examination, etc., *or to any other deed or document* (Order 38, r. 6, following 15 & 16 Vict. c. 86, s. 22; see *Cooke v. Wilby*, 1884, 25 Ch. D. 769). Under the section cited, the Court has taken judicial notice of the seal and signature of a colonial notary attesting a deed not intended for use in any action (*Brooke v. Brooke*, 1881, 17 Ch. D. 833). It appears that where an affidavit is sworn before a foreign notary, evidence verifying both his authority and his signature is necessary (see *In re Davies*, 1869, L. R. 8 Eq. 98; *contra*, *Hayward v. Stephens*, 1866, 36 L. J. Ch. 135; see also the note in the *Annual Practice* to Order 38, r. 6; and Seton on *Decrees*, 5th ed., pp. 98, 203).

4. Admission to act as a notary is governed by the Acts 41 Geo. III. c. 74; 3 & 4 Will. IV. c. 70; and 6 & 7 Vict. c. 90. The appointment of notaries is by the Archbishop of Canterbury, through the Master of the Court of Faculties (Phillimore's *Ecclesiastical Law*, 2nd ed., p. 945). Solicitors who have served no apprenticeship may be admitted to practise beyond ten miles from the City of London (3 & 4 Will. IV. c. 70, s. 2), but in other cases a five years' apprenticeship to a notary, or notary and solicitor (6 & 7 Vict. c. 70, s. 1), is necessary (*ibid.* s. 3); and in the City of London and within three miles thereof, Westminster and Southwark, a notary must also be a freeman of the Scriveners' Company. Unadmitted persons are forbidden to practise as notaries for reward, under a penalty of £50 (6 & 7 Vict. c. 90, s. 10).

5. Every British ambassador, envoy, minister, chargé d'affaires, secretary of legation, consul, vice-consul, and consular agent, acting in any foreign place, may there administer any oath, or do any notarial act which any notary public may do in the United Kingdom (52 Vict. c. 10, s. 6).

6. Every notarial act, except a protest of a bill of exchange (see PROTEST), must have a 1s. stamp (Stamp Act, 1891, Sched.), which may be an adhesive stamp (*ibid.* s. 90).

7. A notary is also an ancient official of the Ecclesiastical Courts, corresponding to a registrar. "A judicial register of records made by him is evidence in every Court according to the civil and common law" (Phillimore, p. 950).

[*Authorities*.—Brooke's *Office of a Notary*; Phillimore's *Ecclesiastical Law*, 2nd ed., p. 945.]

Note of Hand.—See PROMISSORY NOTE.

Notes verbales (dipl.) are written communications from Governments through their diplomatic agents to other Governments. Negotiations are generally carried on by *notes verbales*, which are unsigned, and considered merely as tentative until they result in an understanding.

Not Guilty.—Under the old common law system of pleading, there were a series of pleas classed together as the general issue, viz. on actions of contract (1) *nunquam indebitatus*; (2) *non assumpsit*; (3) *non est factum* (see PLEADING, *Before the Judicature Acts*); and on actions of tort (4) *non detinet* (in detinue); (5) *non cepit* (in replevin); and (6) not guilty in other cases.

The right to plead “not guilty” was extended by many particular statutes, to actions in respect of acts done under or by colour of the statute.

Until 1853 the common law plea of not guilty had not the effect of a mere traverse or contradiction of the averments in the declaration; but amounted to a general denial of the defendant’s liability, putting the plaintiff to the strictest proof, and entitling the defendant to raise almost every kind of defence in law or fact.

Under the Common Law Procedure Acts and Rules, the plea, while not abolished, was reduced to a mere traverse, and the defendant was required to set up any special matter on which he relied, and under the Judicature Acts and Rules the common law plea of not guilty was abolished.

These changes did not apply with reference to pleas of not guilty by statute, which remained unaffected, the defendant merely being required to state in the margin of his defence or plea the statute on which he relied, and prohibited from joining, save by special leave, any other defence with that of not guilty by statute (R. S. C., 1883, Order 19, r. 21; Order 21, r. 19). By the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61, s. 2 (c)), the right to plead the general issue in an action or proceeding under any public general Act was wholly abolished, and a specific repeal was effected of many particular clauses in such Acts. By Pollock’s Act (5 & 6 Vict. c. 97, s. 3), all provisions in all acts of a local and personal nature (whether public or not) permitting the pleading of the general issue were repealed. This applies to all such Acts in force on 10th August 1842. Consequently the general issue of not guilty can now be pleaded, if at all, in a civil case only under a statute of a local and personal nature passed since 1842 (*Boden v. Smith*, 1849, 18 L. J. C. P. 121); and while it cannot be said without any examination of the mass of such Acts that no case now exists for such a plea, it is highly improbable that a Select Committee on a bill of this character has since 1842 allowed such a clause to be inserted. These repeals do not affect informations at the suit of the Crown or indictments for statutory offences.

The plea of not guilty was also used in answer to informations on penal statutes, and to all indictments. It was the only plea on which sentence of death could be passed (4 Black. Com. 338). On indictments for treason and piracy, when tried according to the course of the common law, and for felony, the accused, on arraignment, had not only to plead in person, but to elect his mode of trial. He was called to the bar and directed to hold up his hand; and the indictment was read to him, and he was asked, “How say you, Guilty or not guilty?” If he answered “Not guilty,” he was next asked, “How will you be tried?” “By God and my country” (*en pais*); to which the response was, “God send you a good deliverance” (see 1 Chit. Cr. Law, 415).

The Criminal Law Act, 1827 (7 & 8 Geo. IV. c. 28, s. 1), got rid of all these ancient formalities in treason, felony, or piracy, except in the case of persons having privilege of peerage; and in 1841 (4 & 5 Vict. c. 22) the ancient mode of pleading by such persons was abolished as to felony (see *R. v. Cardigan*, 1841, 4 St. Tri. N. S. 601). But the right to trial by peers

remains as to treason, felony, and piracy, *jure gentium*, etc. This change in the law does not alter the effect of the plea, but makes the mode of trial by jury a matter of course instead of particular election.

Where the defendant to an indictment refused to plead guilty or not guilty, he was subjected to the *peine forte et dure*. This was abolished in 1772 (12 Geo. III. c. 20), and the effect of refusal to plead in felony was made equivalent to a plea of guilty. Since 1827, when the defendant, not being mute by the visitation of God, refuses to plead, a plea of not guilty is entered, and the trial proceeds (7 & 8 Geo. IV. c. 28, s. 2). Any question whether the defendant is mute of malice or by visitation of God is determined by a jury sworn to try the preliminary issue. If their verdict is "Mute by the visitation of God," a second issue must be determined, whether the defendant is able to plead and understand the proceedings at the trial. If he is not, he is treated as insane, unless the incapacity is temporary (*R. v. Berry*, 1876, 1 Q. B. D. 447).

The effect of the plea is to put the prosecution to the proof of all facts and circumstances constituting the offence, and the burden of proving which lies on them, and to entitle the defence to raise any matter which contradicts the indictment, or excuses or qualifies the acts alleged as an offence, without specially pleading the special matters to be put in evidence. On charges of misdemeanour, special pleas in lieu of the plea of not guilty were admissible and in some cases necessary (1 Chit. *Cr. Law*, 472; Archb. *Cr. Pl.*, 21st ed., 156). This extends to absolute objections to the jurisdiction of English Courts over the offence, but not to objection to the jurisdiction of the particular Court (see *R. v. Jameson*, [1896] 2 Q. B. 425; ABATEMENT).

[*Authorities*.—Archb. *Cr. Pl.*, 21st ed.; Bullen and Leake, *Pr. Pl.*, 3rd ed.]

Notice.—In this article it is proposed merely to summarise the chief legal meanings of the word "notice." The making something known that a man was or might be ignorant of before.

It is necessary to give notice to justify certain proceedings, *e.g.* before entry on another's land to abate a nuisance there (see *Lemmon v. Webb*, [1895] App. Cas. 1), and to make time of the essence of a contract where it was not originally so, and one party has been guilty of delay, in which case the notice must be reasonable (*Compton v. Bagley*, [1892] 1 Ch. 313).

Again, a person who is in possession of a thing in respect of which another is bound by statute or contract to fulfil a duty at uncertain intervals, must give notice of the necessity for such fulfilment to the person liable (*London & S.-W. Rwy. Co. v. Flower*, 1875, 1 C. P. D. 77; 45 L. J. C. P. 54; *Makin v. Watkinson*, 1870, L. R. 6 Ex. 25; *Hugall v. Maclean*, 1885, 53 L. T. 94; 33 W. R. 588, where it was held that a lessor covenanting to repair, cannot be sued for non-repair unless notice of want of repair is given to him). Generally, on the subject of notice in cases of contract, see Baron Parke's judgment in *Vyse v. Wakefield*, 1840, 6 Mee. & W. 442, 453; and Chitty on *Contracts*, 13th ed., pp. 612–613.

A tenant on whom a writ in an action of ejectment has been served, is bound, under penalty of three years' rent, forthwith to give notice of the writ to his landlord (Common Law Procedure Act, 1852, s. 209).

As to notice of assignment of a chose in action, see vol. i. p. 356.

Notice of dishonour of bills of exchange, see vol. ii. p. 103.

Notice to pay off mortgage money, see MORTGAGE.

Payment of a cheque is countermanded by notice to the banker of the customer's death (Bill of Exchange Act, 1882, s. 75).

A continuing guarantee, *c.g.* of a person's account at a bank, provided there is nothing to the contrary stipulated for, is revoked as to subsequent advances by notice of the surety's death (*Coulthart v. Clementson*, 1879, 5 Q. B. D. 42; *In re Silvester, Midland Rwy. Co. v. Silvester*, [1895] 1 Ch. 577).

Special business can be transacted at a meeting of the directors of a company without previous notice thereof (*La Compagnie de Mayville v. Whitley*, [1896] 1 Ch. 788).

As to notice of action, see that heading.

As to notice to justices required before application for certiorari, see Crown Office Rules, 1886, r. 33.

Form and Contents of Notices.—To avoid doubt or ambiguity in the terms of a notice, it is advisable to give it in writing, and to preserve evidence of its delivery by making an indorsement of service on a copy (*Stapylton v. Clough*, 1853, 2 El. & Bl. 933; 23 L. J. Q. B. 5). All notices required by the Rules of the Supreme Court are to be in writing, unless expressly authorised by the Court or a judge to be given orally (Order 66, r. 1, R. S. C. 1883).

Notice of intention to take depositions under 30 & 31 Vict. c. 35, s. 6, must be in writing (*R. v. Shurmer*, 1886, 17 Q. B. D. 323).

The requisites for the validity of notices under the Conveyancing, etc., Act, 1881, will be found in sec. 67.

Notices of distress, see DISTRESS, vol. iv. p. 302.

Notices of suspension of payment by a debtor, see BANKRUPTCY, vol. i. p. 490. The addition of words like "without prejudice" to such notices makes no difference (*In re Daintrey, Ex parte Holt*, [1893] 2 Q. B. 116).

A notice under sec. 94 of the Public Health Act, 1875, to abate a smoke nuisance, need not require the execution of any works or the doing of anything as a means to the abatement (*Millard v. Wastall*, [1898] 1 Q. B. 342). For a case where a notice under the same section was held bad for not specifying works, see *R. v. Wheatley*, 1885, 16 Q. B. D. 34.

"Waiver" of notice was discussed in the case of *In re Thompson & Holt*, 1890, 44 Ch. D. 492.

Notice (Equitable Doctrine of).

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GENERALLY.

Any person taking an estate or interest with notice of a prior equity affecting it, is bound to give effect to that equity. The rule was established, certainly as early as 1669 (see *Merry v. Abney*, 1 Ch. Cas.

38). The case usually referred to as the leading authority is the decision of Lord Hardwicke in *Le Neve v. Le Neve*, 1747, Amb. 436; 3 Atk. 646; 2 White and Tudor, *L. C. Eq.*, ed. 1897, pp. 175 *et seq.*

This case established that the rule applied not only where the principal had notice, but if he were ignorant and his agent had notice. This rule is now to some extent qualified by the C. A. 1882, *infra*.

OF DEEDS RELATING TO LAND IN MIDDLESEX.

Le Neve v. Le Neve (*supra*) also established that the rule applied in a register county (see REGISTRATION OF DEEDS), notwithstanding the express words in the Middlesex Registry Act that every deed or conveyance that should not be registered as directed "shall be adjudged fraudulent and void against any subsequent mortgagee or purchaser for valuable consideration." Lord Hardwicke adopted the words of King, L.C., in *Blades v. Blades*, 1727, 1 Abr. Ca. Eq. 358, pl. 12: "They would never suffer any Act of Parliament made to prevent fraud to be a protection to fraud"; and held that "taking the legal estate after notice of a prior right makes a man a *malá fide* purchaser, and is a species of fraud."

See also a decision of the C. A. reversing Jessel, M. R., in *Greaves v. Toftield*, 1880, 14 Ch. D. 563, on an annuity deed not registered under 18 & 19 Vict. c. 15, s. 12, which contains similar words, and of the Privy Council on the New South Wales Registry Acts (*Sydney, etc., Association v. Lyons*, [1894] App. Cas. 260).

Le Neve v. Le Neve also settled that the Registry Act operated to give the grantee under the registered conveyance the legal estate at law (see *Doe v. Allsop*, 1821, 5 Barn. & Ald. 142).

Notwithstanding the doctrine laid down in *Le Neve v. Le Neve*, that taking the estate with notice of a prior right was fraud, eminent judges have doubted the policy of Lord Hardwicke's decision in that case, in allowing notice of an equity to prevail against the express words of the statute. See per Sir W. Grant in *Wyatt v. Barwell*, 1815, 19 Ves. 439; 13 R. R. 236; per Lord Romilly in *Ford v. White*, 1852, 16 Beav. 120, and *Rolland v. Hart*, 1871, 6 Ch. 678; and the cases indicate that in the absence of proof of actual knowledge of a prior equity, stronger evidence will be required to affect with constructive notice, *e.g.* from negligence, a person taking under a registered deed than one taking under an unregistered deed (see per Lord Hardwicke in *Hine v. Dodd*, 1741, 2 Atk. 275, before his decision in *Le Neve v. Le Neve*; and see *Jolland v. Stainbridge*, 1797, 3 Ves. 478; 4 R. R. 64; *Lee v. Clutton*, 1875, 45 L. J. Ch. 43; on app. 46 L. J. Ch. 48; *Chadwick v. Turner*, 1866, L. R. 1 Ch. 310). It is difficult, however, to extract from the cases any clear rule for distinguishing the difference between notice in case of a registered and unregistered deed. The judgment of Lord Selborne in 1874 in *Agra Bank v. Barry*, L. R. 7 H. L. 135, on a case under the Irish Act, quoted by James, L.J., in the late case of *Lee v. Clutton*, 1876, 46 L. J. Ch. 48, as showing the guiding principle applicable to a registered deed, still seems the best statement of it on the books. Lord Selborne says:

It would be inconsistent with that policy (*i.e.* of the Registry Acts) to hold that a purchaser or mortgagee is under an obligation to make any inquiries with a view to the discovery of unregistered interests. But it is quite consistent with that, that if he or his agent actually knows of the existence of such unregistered instruments when he takes his own deed, he may be estopped in equity from saying that, as to him, they are fraudulent.

This was the effect of the old Registry Acts, and still is relevant in the case of land in Middlesex.

OF DEEDS RELATING TO LAND IN YORKSHIRE.

The old Yorkshire Acts were repealed by the Yorkshire Registry Act, 1884, 47 & 48 Vict. c. 54, amended by 48 & 49 Vict. c. 26 (and this gives priority according to date of registration, and expressly provides that such priority shall not be lost by notice except in cases of actual fraud), s. 14, enacts that—

Subject to the provisions of this Act, all assurances entitled to be registered under this Act shall have priority according to the date of registration thereof, and not according to the date of such assurances, or of the execution thereof; and every will *entitled to be registered* under this Act shall have priority according to the date of the death of the testator, if the date of registration thereof be within, or under this Act to be deemed within, a period of six months after the death of the testator, or according to the date of registration thereof if such registration be not within, or under this Act to be deemed not within, such period of six months: Provided that nothing in this Act shall interfere with the priorities as between themselves of any assurances or wills, the dates of registration of which may be identical.

All priorities given by this Act shall have full effect in all Courts except in cases of actual fraud, and all persons claiming thereunder any legal or equitable interests shall be entitled to corresponding priorities, and no such person shall lose any such priority merely in consequence of *his having been affected with actual or constructive notice, except* in cases of actual fraud; but nothing in this section contained shall operate to confer upon any person claiming without valuable consideration under any person any further priority or protection than would belong to the person under whom he claims; and any disposition of land or charge on land which, unregistered, would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner.

In the case of *Battison v. Hobson*, [1896] 2 Ch. 403, Stirling, J., said on this sec. 14 of the Yorkshire Registry Act of 1884 (see p. 412): "Actual fraud I understand to mean fraud in the popular acceptance of the term, *i.e.* fraud carrying with it grave moral blame, and not what has been sometimes called legal fraud, or constructive fraud, or fraud in the eye of a Court of equity."

He decided that the mortgagee under the registered deed being a solicitor who had acted for one of the mortgagees under the unregistered mortgage, could not claim against it, because it was his duty as solicitor to have perfected the mortgage by registration, and that taking advantage of the defect to get a security for himself would amount to actual fraud.

OF UNREGISTERED MORTGAGES UNDER THE MERCHANT SHIPPING ACTS.

Mortgages and the Merchant Shipping Act of 1856, s. 40, are dealt with under SHIP, but it is material to observe that sec. 69 gave priority to the deed first registered, notwithstanding any implied or constructive notice.

It was decided in *Black v. Williams*, [1895] 1 Ch. 408, that although equitable interests in ships are now recognised, a legal mortgage of a ship in statutory form and registered has priority over an equitable mortgage previously given but registered after the legal mortgage, even where the legal mortgagee takes with notice of the charge (see also *Liverpool Bank v. Turner*, 1860, 1 John. & H. 159; 2 De G., F. & J. 502).

REGISTRATION NOT ITSELF NOTICE.

Registration in Middlesex or Yorkshire does not of itself give notice if the register is not searched by the subsequent purchaser or mortgagee (*Morcock v. Dickens*, 1768, Amb. 678; *Cator v. Colly*, 1785, 1 Cox, 182; *Williams v. Sorrel*, 1799, 4 Ves. Jun. 389; *In re Russell, etc.*, 1871, 12 Eq.

78). But see as to the omission to inquire as to document disclosed by the register being an omission of ordinary precaution, *Kettlewell v. Watson*, 1884, 26 Ch. D. 501.

The Yorkshire Registry Act of 1886, 47 & 48 Vict. c. 54, by sec. 15 enacted that registration of any instrument under the Act should be deemed to constitute actual notice of such instrument, but this was repealed the next year by the amending Act 48 & 49 Vict. c. 26, s. 5.

But if a purchaser or mortgagee searches the register he will be deemed to have notice of all instruments registered within the period for which he searched (*Bushel v. Bushel*, 1803, 1 Sch. & Lef. p. 103; *Hodgson v. Dean*, 1825, 2 Sim. & St. 221; *Ford v. White*, 1852, 16 Beav. 120; see also as to searches in other cases, e.g. judgment under the old law, *Ardland v. Piller*, 1876, 10 Ch. 10; and see also *Proctor v. Corpe*, 1853, 2 Drew. 1; 1 Jur. N. S. 149; *Lane v. Jackson*, 1852, 20 Beav. 535; *Rolland v. Hart*, 1871, L. R. 6 Ch. 678. See as to Court Rolls in case of copyholds, Sugden, *Vendors and Purchasers*, 14th ed., p. 780; *Bugden v. Bignold*, 1843, 2 Y. & C. C. 377).

And the fact that the register is not of itself notice is unimportant in case of documents capable of registration and registered under the Irish Act or the Yorkshire Registry Act of 1884, as under those Acts documents take effect according to priority of registration (see as to Irish Act, *Agra Bank v. Barry*, 1874, L. R. 7 H. L. 136), which also shows that notwithstanding the stringent provisions of the Act, if a person registering under it has by himself or his agent notice of a prior unregistered deed, he will not obtain priority over it.

See also under the New South Wales Registry Act, *Sydney, etc. v. Lyons*, [1894] App. Cas. 260.

By the Yorkshire Registry Act of 1884, tacking is abolished and priority given to a second mortgagee under a deed registered over a subsequent advance made by a prior registered legal mortgage, and the doctrine of notice is now of little importance in dealings with land in Yorkshire.

NOTICE UNDER TRANSFER OF LAND ACT, 1862, AND LAND TRANSFER ACTS, 1875 AND 1897.

There appear to be no decisions on questions arising as to the effect of notice on titles taken under these Acts. Very little use has been made of the Act of 1862. It does not contain any prohibition of notice of trusts or equities being registered. By sec. 74 it provides "that no unregistered estate, interest, contract, or engagement for the registration of which provision is made by this Act, shall prevail against the title of any subsequent purchaser for valuable consideration duly registered under this Act." The words do not seem so strong as the words above cited from the Middlesex Registry Act. And by sec. 103 it provides that "nothing contained in this Act shall take away or affect the existing jurisdiction on ground of actual fraud." And by sec. 138 it is enacted that acts or entries obtained by fraud shall be void as between parties and privies.

The Act of 1862 only applies to a few cases, and it is conceived that in any case a registered owner would be affected with notice of a prior unregistered instrument if his claim to be free from it would involve "moral" fraud, as explained by Stirling, J., in *Battison v. Hobson*, [1896] 2 Ch. p. 613 (see *supra*, p. 191). It is impossible to define what notice of an estate or interest inconsistent with that conveyed would be held by a judge to involve moral fraud.

The Act of 1875 makes a distinction between the original registration

of an owner with an indefeasible title (see ss. 7 and 13) and that of a transferee for value (ss. 30 and 36). It seems that the title of the person first registered might under that Act have been affected in cases where a transferee for value would not be, as by sec. 13, subsec. 3, it is provided that the registration of such first proprietor shall be subject, "where such first proprietor is not entitled, for his own benefit, to the land registered as between himself and any persons claiming under him to any unregistered estate, rights, interests, or equities to which such person may be entitled." The transferee for valuable consideration is "to be free from all estates and interests whatsoever, except incumbrances entered on the register, or rights or interests by the Act declared not to be incumbrances."

Sec. 83 provided, "There shall not be entered on the register or be receivable by the registrar any notice of any trust implied, express, or constructive."

Sec. 98 provides, "subject to the provisions in this Act contained with respect to registered dispositions for valuable consideration, any disposition of land or of a charge on land which if unregistered would be fraudulent and void shall, notwithstanding registration, be fraudulent and void in like manner."

There appears to be no express declaration with respect to notice affecting the title in equity. But in the amending Act of 1897, Sched., sec. 83 of the Act of 1875 is repealed, and there is the following provision:—"Neither the registrar nor any person dealing with registered land or a charge shall be affected with notice of a trust express, implied, or constructive, and reference to trusts shall as far as possible be excluded from the register."

This enactment appears not to be directed against notice of prior incumbrances, but merely intended to guard against the register being incumbered with notice of trusts; it may perhaps be held sufficient to preclude a purchaser or mortgagee from being affected with notice of beneficial interests where he is dealing with trustees or executors, provided that to his knowledge the act of the trustee or executor would not necessarily be a breach of trust. But it is conceived that it would not protect a purchaser where he had knowledge that a breach of trust was being committed, nor from notice of some prior equity inconsistent with the estate or interest conveyed to him, as that would appear to come within sec. 98 of the Act of 1875.

It is probable, as suggested in 2 White and Tudor, ed. 1897, p. 219, that constructive notice if applicable would be confined to cases where notice implied participation in such actual fraud as would involve moral blame, as explained by Stirling, J., in *Battison v. Hobson*, [1896] 2 Ch. 410, or the Yorkshire Act.

But, as the cases stand, it may be open to question whether a judge would follow the doctrine laid down by Lord Hardwicke in *Le Neve v. Le Neve* (*supra*), and repeated by Lord Redesdale in *Bushell v. Bushell*, 1803, 1 Sch. & Lef. 100, 9 R. R. 21, that if a man has notice it is fraudulent in him to take a conveyance to defeat the charge of another. See the judgment of the C. A. in *Greaves v. Tofield*, 1880, 14 Ch. D. 563.

ACTUAL NOTICE.

In *Barnhart v. Greenshields*, 1853, 9 Moo. P. C. p. 36, Lord Kingsdown says:

We now come to the parol evidence of notice. Upon this subject the rule is settled, that a purchaser is not bound to attend to vague rumours, to statements by mere

strangers, but that a notice in order to be binding must proceed from some person interested in the property.

The rule seems to be more accurately stated in *Lloyd v. Banks*, 1888, L. R. 3 Ch. 488, though that was a case of notice to a trustee of a fund, not to a purchaser. There, after speaking of the difficulty in attending to casual conversations, Lord Cairns proceeded :

I do not think it would be consistent with the principles upon which this Court has always proceeded, or with the authorities which have been referred to, if I were to hold that under no circumstances could a trustee, without express notice from the incumbrancer, be fixed with the knowledge of an incumbrance upon the fund on which he is a trustee so as to give the incumbrancer the same benefit which he would have had if he himself had given notice to the trustee. It must depend on the facts of the case, but I am quite prepared to say I think the Court would expect to find that those who alleged that the trustee had knowledge of the incumbrance had made it out not by any evidence of casual conversation, much less by any proof of what would only be constructive notice, but by proof that the mind of the trustee has in some way been brought to an intelligent apprehension of the nature of the incumbrance which has come upon the property, so that a reasonable man or an ordinary man of business would act upon the information, and would regulate his conduct by it in the execution of the trust.

If it can be shown that in any way the trustee has got knowledge of that kind, knowledge which would operate upon the mind of any rational man or man of business, and make him act with reference to the knowledge he has so acquired, I think the end is attained.

Though these observations were applied to the case of a trustee, it seems probable they would hold also in the case of a purchaser.

CONSTRUCTIVE NOTICE.

Constructive notice is commonly used in two senses—(1) as meaning notice through notice to an agent, whether actual or implied, without actual notice to the principal; (2) as meaning notice implied, by a presumption of knowledge without evidence of actual notice or knowledge. The use of the word “constructive” in the first sense of notice through notice to the agent may be through actual notice to the agent or “implied” notice.

Strictly speaking, constructive should be used in the second sense only as notice implied by presumption without actual knowledge by or actual notice to either agent or principal, and it is used in that sense in this article.

Notice, through knowledge actual or presumed of an agent, is called imputed notice, as suggested by Lord Chelmsford in *Espin v. Pemberton*, 1859, 3 De G. & J., see p. 556.

Definition of Constructive Notice.—Before the Conveyancing Act of 1882, judges confessed to having great difficulty in defining constructive notice. Lord St. Leonards, in his work on *Vendors and Purchasers*, 1862, 14th ed., p. 781, says, “Everyone who has attempted to define constructive notice has declared his inability to satisfy himself” (see also the cases discussed by Lord St. Leonards, *ibid.*, pp. 780–784, and *Jones v. Smith (supra)*, *Ware v. Egmont*, 1853, 4 De G., M. & G. 473; *Montefiore v. Brown*, 1858, 7 H. L., pp. 262 and 269).

The attempted definition inserted in the Bill introduced by Lord St. Leonards in the House of Lords in 1862, is given (Sugden, *Vendors and Purchasers*, 14th ed., p. 784), but Lord St. Leonards says it was so unsatisfactory that it was struck out with his consent.

The difficulty of giving a definition appears in a great measure to be removed by the Conveyancing Act, 1882, s. 3 (*infra*), which in effect enacts

that a purchaser shall not be affected with notice unless he or his solicitor or agent had actual knowledge, or, what must for the future be taken as the limitation of constructive knowledge, unless the instrument, fact, or thing would have come to his knowledge if such inquiries and inspections had been made, as ought reasonably to have been made, by him or his solicitor or agent.

Another question raised on the cases is whether, in order to affect a purchaser with constructive notice, there must be some act or omission on his part or that of his solicitor or agent amounting to fraud.

In the said Bill introduced into the House of Lords by Lord St. Leonards in 1862, it was proposed to limit constructive notice to cases where the Court "shall be of opinion that the conduct of such purchaser or mortgagee amounted to fraud, or that the neglect to make any or sufficient inquiry amounted to such wilful neglect in order to avoid notice as was equivalent to fraud" (see the clause quoted, Sugden, *Vendors and Purchasers*, 14th ed., p. 784).

It will be seen from some of the cases cited, that constructive notice has generally been put on fraud or negligence so gross as to amount to evidence of fraud, *i.e.* that the purchaser purposely avoided inquiry in order to avoid discovery (see the leading case of *Le Neve v. Le Neve*, *supra*), where Lord Hardwicke says fraud or *mala fides* is the line of ground on which the Court is governed in cases of notice (see also the often-cited case of *Jones v. Smith*, 1841, 1 Hare, 43, *infra*, and the judgment of the Court of Appeal in the case of *Northern Counties, etc. v. Whipp*, 1884, 26 Ch. D. 482; and in *Montefiore v. Brown*, 1858, 7 H. L. 241, see p. 269). Lord Chelmsford says constructive notice cannot be imputed to a party unless his negligence amounts to gross and culpable negligence. In the most recent case of *Bailey v. Barnes*, [1894] 1 Ch. 35, Lindley, L.J., in explaining the expression "culpable negligence," seems to imply that to raise constructive notice the negligence must amount to evidence of intention to avoid notice. He says:

In the celebrated judgment of Wigram, L.C., in *Jones v. Smith* (1 Hare, 43, *supra*), the cases of constructive notice are reduced to two classes: the first comprises cases in which a purchaser has actual notice of some defect, inquiry into which would disclose others; and the second comprises cases in which a purchaser has purposely abstained from making inquiries for fear he should discover something wrong.

But it seems that this will not meet all the cases where it has been implied from mere negligence. See the cases noticed *infra*, where it has been implied from not investigating title when investigation of title has been prevented by contract, in some common form limiting the length of title to be shown, or a case of purchase of leasehold, such as *Patman v. Harland*, 1888, 17 Ch. D. 353; where it was implied from not examining the lessor's title when a statute (the Vendors and Purchasers Act of 1874) prevented the purchaser from doing so. Such contracts are so common that it cannot be said that there was not a transaction of business in the ordinary way a reasonable man would pursue.

Before giving specific instances in which the judges have held purchasers affected with constructive notice, it is convenient to give the enactment in the Conveyancing Act of 1882.

THE CONVEYANCING ACT, 1882, ENACTS AS TO NOTICE—

Sec. 3 (1). A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless—

(1) It is within his own knowledge, or would have come to his own knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or

(2) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel as such, or of his solicitor or other agent as such, or would have come to the knowledge of his solicitor or other agent as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

Sec. 2. This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately, and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

(3) A purchaser shall not, by reason of anything in this section, be affected by notice in any case where he would not have been so affected if the section had not been enacted.

(4) This section applies to purchases made either before or after the commencement of this Act; save that where an action is pending at the commencement of this Act, the rights of the parties shall not be affected by this section.

There have been two cases on the general effect of this Act. In *Bailey v. Barnes*, [1894] 1 Ch. 31, Lindley, L.J., said that this section "really does no more than state the law as it was before, but its negative form shows that a restriction rather than an extension of the doctrine of notice was intended" . . . ; and adds: "Light is thrown on the meaning of "*ought reasonably*" by the Conveyancing Act, 1881, s. 1, subs. 2, which relieves purchasers from mortgagees, purporting to sell under powers of sale, from the necessity of inquiring into the propriety or irregularity of the exercise of the power."

In *In re Cousins*, 31 Ch. D. 671-676, 1886, Chitty, J., said that the section was intended to remedy the evil consequences of the doctrine illustrated by the case of *Hargreaves v. Rothwell*, 1836, 1 Keen, 154, *i.e.* that notice to the solicitor in one transaction might be imputed from notice to him in a former transaction; and to the extent to which this doctrine applied, the section alters the former law so far as regards "purchasers."

The Act is in a negative form: a purchaser shall not be affected, etc., except in the cases excepted.

The first of these is, "unless the fact, instrument, or thing is within his own knowledge," *i.e.* unless he has actual notice (see as to this the case cited *ante*, p. 193, of *Barnhart v. Greenshields*); and it is to be observed that the exception as to his own knowledge does not, as in the case of notice through a solicitor, confine it to cases of knowledge in the transaction in which notice is imputed, and it may be a question whether recollection of previous knowledge be imputed. See the case of *Hamilton v. Royse*, 1804, 2 Sch. & Lef. 32, per Lord Redesdale.

The Act protects a purchaser from being affected by any act, instrument, or thing, unless it is within his own knowledge, or would have come to his own knowledge if such inquiries and inspections had been made as should reasonably have been made by him or his solicitor, the notice to the solicitor being confined to the same transaction in which the question arises.

NOTICE FROM NOT INQUIRING FOR DEEDS.

The most important cases are those with respect to the deeds, and the most valuable judgment on the subject is that of Fry, L.J., in *Northern Counties of England, etc. v. Whipp*, 1884, 26 Ch. D. 492. The Lord Justice analysed the cases in which a mortgagee, though he had the *lég*al estate, would be postponed by some negligence with respect to the deeds, and divided them into the following classes:—

1. Where the legal mortgagee or purchaser has made no inquiry for the title deeds, and has been postponed, either to a prior equitable estate, as in *Worthington v. Morgan*, 1849,

16 Sim. 547, or to a subsequent equitable owner who used diligence in inquiring for the title deeds, as in *Clarke v. Palmer*, 1882, 21 Ch. D. 124. In these cases the Courts have considered the conduct of the mortgagee in making no inquiry to be evidence of the fraudulent intent to escape notice of a prior equity; and in the latter case that a subsequent mortgagee, who was in fact misled by the mortgagor taking advantage of the conduct of the legal mortgagee, could, as against him, take advantage of the fraudulent intent.

2. Where the legal mortgagee has made inquiry for the deeds, and has a reasonable excuse for their non-delivery, and has accordingly not lost his priority, as in *Barnett v. Weston*, 1806, 12 Ves. 130; *Hewitt v. Loosemore*, 1851, 9 Hare, 449; *Agra, etc., Bank v. Barry*, 1874, L. R. 7 H. L. 135.

3. Where the legal mortgagee has received part of the deeds under a reasonable belief that he was receiving all, and has accordingly not lost his priority, as in *Hunt v. Elmes*, 1860, 2 De G., F. & J. 578; *Ratcliffe v. Barnard*, 1871, L. R. 6 Ch. 652; and *Colyer v. Finch*, 1856, 5 H. L. 905.

A very recent case on the subject is *In re Castell & Brown Ltd.*, [1898] 1 Ch. 315, where Romer, J., held that the debenture-holders, having left the title deeds with the company so as to enable it to deal with its property as if it had not been encumbered, could not set up their prior charge against the equitable mortgage to the bank; that the bank had not been guilty of negligence, and, having a stronger equity than the debenture-holders, was entitled to priority.

The older cases are numerous; the following are the most important:—

Plumb v. Pluitt, 1791, 2 Anst. 432; *Evans v. Bicknell*, 1801, 6 Ves. 174; *Hewitt v. Loosemore*, 1851, 9 Hare, 449, 458; *Finch v. Shave*, 1854, 19 Beav. 500; *S. C., nom. Colyer v. Finch*, 1856, 5 H. L. 905; *Roberts v. Croft*, 1857, 24 B. 223; 2 De G. & J. Ch. 1; *Perry Herrick v. Attwood*, 1857, 2 De G. & J. Ch. 37; *Carter v. Carter*, 1857, 3 Kay & J. 617; *Hunt v. Elmes*, 1860, 28 B. 631; 2 De G., F. & J. Ch. 578; *Espin v. Pemberton*, 1885, 4 Drew. 333; 3 De G., M. & G. 454; *Hopgood v. Ernest*, 1865, De G., J. & S. Ch. 116; *Hipkins v. Ameny*, 1860, 2 Gif. 292; *Dixon v. Muckleston*, 1872, 8 Ch. D. 155; *Ratcliffe v. Barnard*, 1871, 6 Ch. D. 652; *Worthington v. Morgan*, 1849, 16 Sim. 547; *Allen v. Knight*, 1846, 5 Hare, 272; 11 Jur. 527; *Broadbent v. Barlow*, 1861, 3 De G., F. & J. Ch. 570; and see note to *Russell v. Russell*, 2 White and Tudor, 7th ed., 76; *Whitbread v. Jordon*, 1835, 1 Y. & C. Ex. 303; *Jones v. Smith*, 1841, 1 Hare, 64; 1 Ph. Ch. 255; *Spencer v. Clarke*, 1878, 9 Ch. D. 137; *In re Morgan*, 1881, 18 Ch. D. 98.

In *Lloyds' Bank v. Jones*, 1885, 29 Ch. D. 221, it was held that it was the duty of the trustee of a marriage settlement to inquire for the deeds, and that the *cestuis que trustent* were postponed to a mortgagee by deposit after the settlement; but see *In re Ingham*, *Jones v. Ingham*, [1893] 1 Ch. 352, where one of the executors held the deeds, and the other was not postponed by the negligence of the holder with respect to them.

In some cases where a small part of a large estate is mortgaged, it is made a condition by the mortgagor that he should retain his deeds; it is clear on the cases that the mortgagee would not be safe in assenting to this, unless notice of the mortgage were indorsed on all the principal deeds.

And it is found in practice that it is essential that this should be done, in order to guard against an innocent dealing with the property, in pure forgetfulness that the mortgage affects it.

HOW FAR AND WHEN NOTICE OF A DEED IS NOTICE OF ITS CONTENTS.

A good explanation of the doctrine as to this is by Jessel, M. R., in *Patman v. Harland*, 1881, 17 Ch. D. 353. Referring to *Jones v. Smith*, 1841, 1 Hare, 43; 1 Ph. Ch. 244, he explains that if a purchaser is told of a deed which need not necessarily affect the title, a marriage settlement for instance (as in *Jones v. Smith, supra*), and is told that it does not affect the land in question, the purchaser is not affected with constructive notice of its contents; but if, on the other hand, he has notice of a deed, and also that it affects the land,

and the question merely is to what extent it affects it, then he is bound to examine it. The Master of the Rolls says the purchaser has no right to rely on the statements "of somebody else that the deed, which you can look at, does not contain something which it does in fact contain," so that the purchaser would in such a case be affected with notice that it prejudicially affects his title; see also the judgment of Lord Esher in *England and Scotland v. Brunton*, [1892] 2 Q. B. 109, and the cases discussed in Sugden, *Vendors and Purchasers*, 14th ed., p. 775, and White and Tudor, *L. C. Eq.*, ed. 1897, p. 217 *et seq.*

Notice of a Material Deed is Notice of what it gives Notice.—It has been also held that where a purchaser has notice of a deed which forms part of the title, he has notice also of whatever that deed, if examined, would give him notice of (see *Moore v. Bennett*, 1678, 2 Ch. Cas. 246; *Biscoe v. Banbury*, 1676, 1 Ch. Cas. 287, see p. 291; *Coppin v. Fernyhough*, 1788, 2 Bro. C. C. 291; *Davies v. Thomas*, 1836, 2 Y. & C. Ex. 234; but see on this Sugden, *Vendors and Purchasers*, 10th ed., p. 215; *Malpas v. Acland*, 1827, 3 Russ. 273; see Sugden, *Vendors and Purchasers*, 14th ed., p. 775, and cases there cited).

The cases do not expressly specify the period to which this implied notice would extend, but it is probable that the notice would not be implied of anything appearing on the deed which it was not necessary to examine in order to get the usual length of title, now forty years. The cases hereinafter referred to, where the purchaser by contract or by statute is prevented from examining deeds beyond a certain date, seem to show that the presumption of notice would only be implied as to what appeared in deeds necessary to be examined in order to get the ordinary root of title.

NOTICE OF A DEED DOES NOT NECESSARILY GIVE NOTICE OF COLLATERAL EQUITIES.

As to the question how far notice of a deed gives notice of collateral equities, see *Borell v. Dann*, 1843, 2 Hare, 440; *A.-G. v. Backhouse*, 1809, 17 Ves. 293; 3 Ridge P. C. 512; *Hamilton v. Royse*, 1804, 2 Sch. & Lef. 315, and the comments of Lord St. Leonards on that decision; Sugden, *Vendor and Purchaser*, 10th ed., p. 475; *Hipkins v. Ameny*, 1860, 2 Gif. 212; *Greenslade v. Dare*, 1855, 20 Beav. 284, and the comments by Lord St. Leonards; Sugden, *Vendor and Purchaser*, 14th ed., p. 766, on *Penny v. Watts*, 1849, 1 Ha. & Tw. 266; 1 Mac. & G. 150; *Abbot v. Geraghty*, 1854, 4 Ir. Ch. Rep. 23.

Restrictive Covenant.—So notice of a valid restrictive covenant affecting the land would make it bind the assignee (*Tulk v. Moxhay*, 2 Ph. Ch. 774; *Nottingham, etc. v. Butler*, 1886, 16 Q. B. D. 778; *Mackenzie v. Childers*, 1890, 43 Ch. D. 265; *Everitt v. Remington*, [1892] 3 Ch. Cas. 187), although it might not run with the land at law; but apparently an assignee of land would not be affected by the covenant if it did not run with the land at law, or bind the land in equity (see *Austerbury v. Oldham*, 1885, 29 Ch. D. 750; *Haywood v. Brunswick, etc., Society*, 1881, 8 Q. B. D. 403; *London and South-Western Ryw. Co. v. Gornn*, 1882, 20 Ch. D. 562).

NOTICE FROM NOT INVESTIGATING TITLE.

In *Wilson v. Hart*, 1866, L. R. 1 Ch. 467, Turner, L.J., said: "It cannot, I think, be denied that generally speaking a purchaser or mortgagee is bound to inquire into the title of his vendor or mortgagor, and will be affected with notice of what appears on the title if he does not so inquire;" and held that the rule applied on taking a lease.

The notice implied is only of what would have been discovered on investigation (*Gainsborough v. Watcombe, etc., Co.*, 1885, 53 L. T. 116; *nom Dunning v. Gainsborough*, 1885, W. N. 110).

It will be observed that the Lord Justice in *Wilson v. Hart, supra*, does not specify the period for which title should be investigated, nor how far back notice by recitals of deeds would give notice of their contents.

It is presumed, and seems to follow from late cases, that the presumption would extend to whatever deeds the purchaser could under an open contract investigate.

Before the Vendors and Purchasers Act, 1874, a purchaser was entitled to a sixty years' title, and longer in special cases. The Vendors and Purchasers Act, 1874, limited the ordinary title to forty years, and it is presumed that this would be treated as the proper limit, and that notice would only extend to what would have been discovered on the investigation necessary in order to get a forty years' title, though this may seem inconsistent with the decision in *Patman v. Harland, infra*, 1881, 17 Ch. D. 253, on another section of that Act.

It was held before the Vendors and Purchasers Act of 1874, that if a purchaser signed an agreement with the common stipulation limiting the length of title to be shown, he would still have imputed to him notice of what he would have discovered in investigating a title for the usual period (see *Robson v. Flight*, 1854, 4 De G., J. & S. Ch. 608; *Parker v. Wayte*, 1863, 1 Hem. & M. 171; *Peto v. Hammond*, 1861, 30 Beav. 495; *Gainsborough v. Watcombe, etc., Co.*, 1885, 53 L. T. 116; 54 L. J. Ch. Cas. 991; *In re Cox & Neve's Contract*, [1891] 2 Ch. 109–118).

By sec. 3, subsec. 1 of the Vendors and Purchasers Act, 1874, under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold, the intended lessee or assign shall not be entitled to call for the title to the freehold. By subsec. 1, recitals in instruments twenty years old, in the absence of evidence to the contrary, are to be deemed sufficient.

By sec. 3, subsec. 1 of the Conveyancing Act of 1881, under a contract to sell or assign a term of years derived out of a leasehold interest in land, the intended assign shall not have a right to call for the title to the leasehold reversion. Under subsec. 2 of the same section, the purchaser of an enfranchised copyhold is not entitled to call for the title to make an enfranchisement. Under subsec. 3 a purchaser is not to require an abstract or production of any instrument prior to the root of title, and is to assume recitals of such prior instruments are sufficient and correct (s. 1 (4)). By subsec. 4, on the sale of a lease it is to be assumed that the lease is duly granted; and under subsec. 5, on a sale of an underlease, that the underlease and superior lease were duly granted.

In *Patman v. Harland*, 1881, 17 Ch. D. 353, Jessel, M. R., held that, notwithstanding the provisions in the Vendors and Purchasers Act, 1874, a lessee was affected with notice of the lessor's title, and anything that he would have discovered if he had made reasonable inquiry.

It is to be observed that, though the decision in *Patman v. Harland, supra*, may logically follow from the cases before the Act of 1874, deciding that a purchaser purchasing under a contract precluding him from going back the full sixty years, was affected with constructive notice of what he would have discovered if the full title had been examined, still the decision, it appears, is contrary to the principle on which the doctrine of constructive notice is founded, whether that be negligence indicating a fraudulent desire to avoid notice, or merely culpable negligence; because

the theory of modern legislation is to insert in contracts by implication what in practice was usually inserted, and therefore conditions commonly submitted to by prudent purchasers.

There does not appear to have been a decision on the question whether a purchaser of an enfranchised copyhold would be affected with constructive notice of anything that would have appeared had the lord's title been investigated; but assuming that the decision in *Patman v. Harland*, *supra*, would be applicable, it must be treated as another anomaly, and not as indicating fraud or culpable negligence.

NOTICE IN COMMERCIAL TRANSACTIONS.

Though it has been laid down that the doctrine of notice does not apply to commercial transactions (*Manchester Trust, etc. v. Furness*, [1895] 2 Q. B. 539), the decision must be read with the circumstances of the case, and cannot be accepted without qualification. Thus knowledge that a man is an agent, has been held notice of the extent of his authority (see *London Joint Stock Bank v. Simmons*, [1892] App. Cas. 201, see p. 229; *Cooke v. Eshelbey*, 1887, 12 App. Cas. 271; *Sheffield v. London, etc., Bank*, 1888, 13 App. Cas. 333; and comments on it in *London, etc., Bank v. Simmons*, [1892] App. Cas. 201; and see notes to *George v. Claggett*, 2 Smith's L. C., ed. 1896, p. 135).

And gross negligence has in commercial transactions been held notice of a fraud, *e.g.* when the negligence is such that the Court may imply the taker of a negotiable instrument was wilfully shutting his eyes (*Salomons v. Bank of England*, 1810, 13 East, 135 n.; *May v. Chapman*, 1847, 16 Mee. & W. 355; *Jones v. Gordon*, 1877, 2 App. Cas. 616); and in *London Joint Stock Bank v. Simmons*, [1892] App. Cas. 201, Lord Herschell says, p. 230:

I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice, is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him.

If this statement of the common law doctrine is compared with the description of constructive notice in some of the equity cases above cited, it will be seen that the two are very similar, if not identical.

EXCEPTION FROM CONSTRUCTIVE NOTICE OF MORTGAGES TO TRUSTEES.

In the case of mortgages to trustees, there is an important exception to the doctrine of constructive notice being implied from facts which would put a reasonable man on inquiry, or imply knowledge of a trust. When trustees invest on mortgage, it is the settled practice to keep the trusts off the title, and take the mortgage to the trustees simply as advancing money on a joint account; and on the appointment of new trustees, to transfer by a separate transfer, with a recital that the transferees have become entitled in equity (see Davidson, 1861, vol. ii. part 2, pp. 51 and 805).

In the case of *Harman v. Uxbridge, etc., Ry. Co.*, 1883, 24 Ch. D. 720 the mortgage being taken to a single mortgagee, who had died bequeathing his property on trusts under which the widow became executor and trustee, she transferred the mortgage without any pecuniary consideration, and with the common recital that the transferees had become entitled in equity; on

objection, on a subsequent sale, that there was a trust, Pearson, J., dismissed the summons, saying :

Every one knows that when in a mortgage deed the mortgage money is stated to belong to several persons on a joint account, those persons are, in ninety-nine cases out of a hundred, trustees of the money, and yet the Court has always resolutely refused to go behind the recital or to inquire what the trusts are. The object of such recital being to keep the trusts off the face of the deed, the Court has always said that the persons to whom the conveyance is made can deal with the property as absolute owners.

The practice was recognised also by Chitty, J., in *Carritt v. Real, etc., Co.*, 1889, 42 Ch. 263, though in this case the trustee had only an equitable interest, the trust property being an equity of redemption in leaseholds. The trustee fraudulently mortgaged the property by deposit of the deeds, and Chitty, J., held that, as the interest mortgaged by the trustee was only equitable, the prior right of the *cestui-que trust* prevailed against that conferred by the trust deed, which seems to show that the practice, however well recognised, does not override the ordinary doctrine that equitable interests take effect in order of priority of date. See also as to this, *In re Morgan, Pillgrem v. Pillgrem*, 1881, C. A. 18 Ch. D. 93, per Jessel, M. R., p. 103, though the doctrine would not give creditors of a testator any right against an assignee for value from an executor residuary legatee of an equitable act, when the assignee had no notice that debts were unpaid (*Graham v. Drummond*, [1896] 1 Ch. 968).

The law on the subject, however, is in an unsatisfactory state. First, because the rule that equitable interests need not be disclosed only applies when the transferee or grantee takes the legal estate; the case of *Carrit, etc.*, *supra*, 1889, 42 Ch. 262, shows that when an equitable interest only is taken by the trustee, the equitable title of the beneficiary is material, and should be disclosed and examined. And second, because it seems clear that, in any case, if the trusts were disclosed even by the common accident of the settlement or will creating the trust, or notice of it being with the papers relating to the mortgage, and seen on examination of the deeds by the proposed transferee, or by reason that the solicitors should think it proper to disclose the trust, the transferee, if the mortgage of it were transferred, would be affected by it, or the mortgagor in case of reconveyance, and it seems absurd that, while it is admitted by everybody that the common recital indicates a trust, and makes known to all parties there is a trust, but does not affect transferees with notice, yet if there is any document referred to showing the trust, the whole is put on the title. It would save great expense if, in supplement to the provisions as to trustees' receipts, it were enacted that persons taking title, either immediately or derivatively through a trustee who had power to give receipts, or in whom the property was vested by a deed not disclosing the trust, should not be affected by any beneficial interests.

NOTICE IMPUTED THROUGH SOLICITOR OR AGENT.

See C. A. 1882, s. 3, subs. 2, cited *supra*; and see per Chitty, J., in *In re Cousins*, 1886, 31 Ch. D. 671, where he explains that the notice must come or be imputed, not only on the same transaction, but to the solicitor as such, that is to say, as solicitor for the person to whom notice is to be imputed.

The enactment that the notice must be in the same transaction, restores the doctrine of *Warwick v. W.*, 1745, 3 Atk. 294, in opposition to that in *Hargreaves v. Rothwell*, 1836, 1 Keen, 154. See also *Blackburn, Low, etc. v. Vigors*, 1887, 12 App. Cas. 531.

And see as to the case of a solicitor himself selling or mortgaging, *Dart, Vendor and Purchaser*, ed. 88, p. 988; *In re Weir*, 58 L. T. 792.

For the principal to be affected, it must be the duty of the solicitor or agent to communicate to the principal (*Wyllie v. Pollen*, 1863, 3 De G., J. & S. Ch. 596; 32 L. J. Ch. 782).

See as to the cases of common officer of two companies, where it has been held that his knowledge as officer of one company could not be imputed to the other, *In re Hampshire Land Co.*, [1896] 2 Ch. 743; 75 L. T. 181; *Royal British Bank v. Turquand*, 1856, 6 El. & Bl. 437; *In re Marseilles Extension Rwy. Co., Ex Credit Foncier, etc.*, 1871, 7 Ch. D. 161; *Gale v. Lewis*, 1847, 9 Q. B. 730; 16 L. J. Q. B. 119.

Notice imputed through Solicitor cannot be rebutted by Evidence of Non-disclosure.—*Bradley v. Riches*, 1873, 9 Ch. D. 196; *Espin v. Pemberton*, 1859, 3 De G. & J. Ch. 547; *Rolland v. Hart*, 1871, 6 Ch. D. 678, see p. 672; see also *Vane v. Vane*, 1873, L. R. 8 Ch. 400.

Whether the imputed Notice can be rebutted by Fraud of the Solicitor.—*Kennedy v. Green*, 1834, 3 Myl. & K. 699, is the case generally referred to. There it was held notice could not be imputed to the client, because in the very transaction the solicitor was practising a fraud on the client; and see *Sharpe v. Foy*, 1868, 4 Ch. D. 35; and see *Espin v. Pemberton*, 1859, 3 De G. & J. Ch. 555, where Lord Chan. Chelmsford said that the commission of the fraud broke off the relation of solicitor and client. But for the imputed notice to be excluded, the fraud must be in the same transaction (*Rolland v. Hart*, 1871, 6 Ch. D. 678; see also *Atterbury v. Wallis*, 1854, 8 De G., M. & G. Ch. 454; *Boursot v. Savage*, 1866, L. R. 2 Eq. 134, and the cases cited 2 White and Tudor, *L. C. Eq.*, ed. 1897, pp. 235–238).

NOTICE OF JUDGMENT.

See the judgment of Chitty, J., in *In re Kensington*, 1885, 29 Ch. D. 531, on the Acts 1 & 2 Vict. c. 110, s. 19; 2 & 3 Vict. c. 11, s. 4; 3 & 4 Vict. c. 82, s. 2. They were so framed as to impose an obligation on the purchaser, mortgagee, or judgment creditor to search the register for five years only. They were also so framed as to do away with “the equitable doctrine of notice of the charge where the charge was not registered.” See also 23 & 24 Vict. c. 38, requiring that, to affect land, execution should be issued and the writ registered; and 27 & 28 Vict. c. 112, enacting that there must be delivery and execution.

As to what is delivery in execution of an equitable interest, see *Anglo-Italian Bank v. Davies*, 1878, 9 Ch. D. 275; *Ex parte Evans*, 1879, 11 Ch. D. 691; 13 Ch. D. 252, and cases where it could not be granted; *Holmes v. Millage*, [1893] 1 Q. B. 551; *Harris v. Bearuchamp*, [1894] 1 Q. B. 801. See these statutes explained in *In re Pope*, 1886, 17 Q. B. D. 743; and the Land Charges Registration and Searches Act, 1888, passed to remove the danger noticed in *In re Pope*. As to notice of *Lis pendens*, see LIS PENDENS.

Notice in Lieu of Service.—See SUBSTITUTED SERVICE.

Notice, Judicial.—See COGNISANCE, JUDICIAL.

Notice of Accidents.—See vol. i. p. 65.

Notice of Action.—There were formerly many cases in which it was necessary for a plaintiff, one clear calendar month at least before issuing his writ (5 & 6 Vict. c. 97, s. 4), to give the proposed defendant notice that an action would be commenced against him, so as to enable him, if he thought fit, to tender amends before any costs were incurred. The plaintiff was required to state clearly in the notice the cause of action threatened, and also, in some cases, the Court in which he proposed to sue, with, of course, his own name and address, or that of his solicitor. There were numerous Acts of Parliament which required notice of action to be given, generally to persons acting in some public capacity, against whom proceedings were threatened in respect of any matter done or omitted, or intended to be done or omitted, in the execution of their official duties. Thus local authorities, justices of the peace, judges and officers of any County Court, officers of the army, navy, marines, customs and excise, etc., were entitled to this protection, if they were sued for any matter done in the discharge of their duty, or of what, under the circumstances as then known to them, they honestly believed to be their duty (*Chamberlain v. King*, 1871, L. R. 6 C. P. 474). But these provisions did not apply to actions in which the plaintiff claimed an injunction, *e.g.* to restrain a nuisance; as then he was bound to take immediate action (*Bateman v. Poplar District Board of Works*, 1886, 33 Ch. D. 360).

Now, however, by the PUBLIC AUTHORITIES PROTECTION ACT, 1893 (56 & 57 Vict. c. 61), s. 2, “so much of any public general Act as enacts that notice of action is to be given” is repealed; and, in particular, the enactments specified in the schedule to that Act are also repealed. Hence, in all ordinary cases, it is no longer necessary for the plaintiff to give any notice of action. But if notice of action was required by any Act of Parliament, which is not a public general Act, and which is not mentioned in the schedule, it must still be given; for such enactment is not repealed.

Notice of Dishonour.—See BILLS OF EXCHANGE.

Notice of Intention to Proceed.—See MONTH’S NOTICE OF INTENTION TO PROCEED.

Notice of Judgment.—The Rules of the Supreme Court, 1883, adopt with but trifling alterations the very useful provisions first introduced by the Chancery Procedure Act, 1852 (15 & 16 Vict. c. 86, s. 42), under which any residuary legatee, or next-of-kin, or any legatee interested in a legacy charged on real estate, or any person interested in the proceeds of real estate directed to be sold, or any residuary devisee or heir, or any one of several *cestuis-que trustent* under any deed or instrument, who may be entitled to a judgment or order for administration, may obtain such judgment or order without serving the other parties in the same interest (Order 16, rr. 33–36). And an executor, administrator, or trustee entitled thereto may have a judgment or order against any one legatee, next-of-kin, or *cestui-que trust* for administration of the estate or execution of the trust (r. 38). Formerly, in all the above cases, the persons who, according to the practice of the Court of Chancery at the date of the passing of the Chancery Procedure Act, 1852, would have been necessary parties to the suit, were required to be served with notice of the decree. After such notice they

were bound by the proceedings in the same manner as if they had been originally made parties, and they might obtain an order of course for liberty to attend the proceedings under the decree, and might within one month after service apply to the Court to add to the decree (15 & 16 Vict. c. 86, s. 42, r. 8; Cons. Order 23, r. 18).

Under the present practice the rule as to service of notice of judgment is no longer obligatory, but permissive only. For it is provided that whenever, in any action for the administration of the estate of a deceased person, or the execution of the trusts of any deed or instrument, or for partition or sale of any hereditaments, a judgment or order has been pronounced or made (*a*) under Order 15, (*b*) under Order 33, (*c*) affecting the rights or interests of persons not parties to the action, the Court or a judge may direct that any persons interested in the estate or under the trust, or in the hereditaments, shall be served with notice of the judgment or order (Order 16, r. 40). In the case of orders for general or partial administration in proceedings commenced by originating summons under Order 55, rr. 2, 3, the Court or a judge may give any special directions, touching the carriage or execution of the judgment, or the service thereof upon persons not parties, as they or he may think just (Order 55, r. 9).

The above observation, however, is subject to this qualification, that in actions under the Partition Act, 1868 (31 & 32 Vict. c. 40), a statutory obligation is imposed that all persons who would formerly have been necessary parties to the suit shall be served with notice of the judgment, unless indeed service be dispensed with under the Partition Act, 1876 (39 & 40 Vict. c. 17), in which case the complicated provisions of the last-named Act must be complied with (*Phillips v. Andrews*, 1887, 35 W. R. 266). See PARTITION.

Directions as to Service.—Upon the return of the summons to proceed with the judgment or order, the Master will, if satisfied by proper evidence that all necessary parties have been served with notice of such judgment or order, give directions as to the mode of working it out (Order 55, r. 33; see *De Balinhard v. Bullock*, 1852, 9 Hare, App. xiii.).

If, however, on the hearing of the summons, it appears that all necessary parties are not parties to the action, or have not been served with notice of the judgment or order, directions may be given for advertisements for creditors, and for leaving the accounts in chambers; but the adjudication on creditors' claims and the accounts are not to be proceeded with, and no other proceeding is to be taken, except for the purpose of ascertaining the parties to be served, until all necessary parties shall have been served, and are bound, or service shall have been dispensed with, and until directions shall have been given as to the parties who are to attend the proceedings (Order 55, r. 36).

Parties to be served.—It was held, under the old practice, that only those persons who, under the practice prior to 15 & 16 Vict. c. 86, were necessary parties to a suit before decree, ought to be served with notice of the decree (*Colyer v. Colyer*, 1863, 11 W. R. 355; and see *Knight v. Pocock*, 1857, 24 Beav. 431).

Where an estate is to be sold under the order of the Court, the general rule is that all the parties interested in the proceeds must, to secure a proper and advantageous sale, and protect the title of purchasers from being open to inquiry or impeachment, be parties to the suit or be served with notice of the judgment (*Doody v. Higgins*, 1852, 9 Hare, App. xxxii.).

A distinction between suits by creditors and suits by legatees, is that in suits by creditors, where one sues on behalf of others, the law gives a

power to the trustees to deal with the estate, which it does not give in the case of legatees (*Doddy v. Higgins (ubi supra)*).

In order to bind remaindermen, they must be served with the judgment; but it is a rule of practice that no such directions should form part of the judgment (*Greaves v. Smith*, 1871, 22 W. R. 388).

Where a party was served with notice of decree, and afterwards married, the trustees of her settlement were directed to be brought before the Court by service on them of the decree (*White v. Stewart*, 1866, 35 Beav. 304).

Where an action was made for service of notice of judgment on a purchaser who was no party to the suit, this was held to be improper, and the order was discharged for irregularity (*In re Symons, Betts v. Betts*, 1886, 54 L. T. 501).

Dispensing with Service.—Where, upon the hearing of the summons to proceed, it appears that by reason of absence, or for any other cause, the service of notice of the judgment or order upon any party cannot be made or ought to be dispensed with, the judge may, if he shall think fit, wholly dispense with such service, or may at his discretion order any substituted service or notice by advertisement or otherwise in lieu of such service (Order 55, r. 35).

Where service of notice of a judgment or order for accounts and inquiries is dispensed with, the judge in person may, if he thinks fit, order that the persons as to whom service is dispensed with shall be bound as if served, and they shall be bound accordingly, except where the judgment or order has been obtained by fraud or non-disclosure of material facts (Order 55, r. 35 a).

Service.—Notice of judgment must be personally served, except in the case of infants and persons of unsound mind, when it must be served in the same manner as a writ of summons in an action (Order 16, r. 44). As has already been stated, an order may in a proper case be obtained for substituted service under Order 55, r. 35.

It was held under the old practice that an order might be obtained for service of the notice out of the jurisdiction (*Strong v. Moore*, 1853, 22 L. J. Ch. 917; *Chalmers v. Laurie*, 1853, 10 Hare, App. xxvii.). But the authority of those cases can no longer be relied on; for in *In re Cliff, Edwards v. Brown*, [1895] 2 Ch. 21, it was expressly decided that the Court has no power to order service out of the jurisdiction of notice of an order made on originating summons. It is true that in that case the exact point decided was confined to the case of an order made on summons, but the principle of the decision is equally applicable to service of notice of an order made in an action commenced by writ (cp. *In re Busfield, Whaley v. Busfield*, 1886, 32 Ch. D. 123). In *In re Cliff* it was said that, if notice were given to a party resident abroad of the application intended to be made to the Court, and if after such notice he did not choose to come in, the Court would act upon the order in his absence. It cannot, however, be said that the question of the service of proceedings out of the jurisdiction has been left in a satisfactory condition, and it is greatly to be regretted that steps have not been taken ere this to remedy a serious defect in the practice of the Courts. In a partition action, where an order dispensing with service entails very serious delay and expense, inability to grant leave to serve notice of the judgment out of the jurisdiction might be productive of grave inconvenience.

Memorandum to be indorsed.—The notice of judgment served on a party whom it is desired to bind by the proceedings must be indorsed with the memorandum prescribed by the Rules of the Supreme Court (Order 16, r. 43; App. G. No. 28).

Appearance.—Under the former practice, an order of course to attend the proceedings could be obtained by a party served with notice of a decree. Now, however, he need no longer obtain such an order, but will be at liberty to attend the proceedings upon entering an appearance at the Central Office in the same manner as a defendant entering an appearance (Order 16, r. 41).

Entry of Memorandum of Service.—A memorandum of the service upon any person of notice of the judgment or order must be entered at the Central Office upon due proof by affidavit of such service (Order 16, r. 42); and a copy of the certificate of the Central Office of such entry, and of every appearance entered by a person served with such a notice certified by the solicitor in the matter, must be left at chambers (Order 55, r. 31).

Effect of Service.—The parties served with notice of judgment are bound as if they had originally been made parties (Order 16, r. 40). (See the judgment of Kay, J., in *May v. Newton*, 1887, 34 Ch. D. 345.) That learned judge summed up the result of the rules thus: "The effect of all these rules is that persons interested in the property which is being administered, and whose rights or interests may be affected by an order directing accounts or inquiries, are not bound—at any rate when they ought to be served with notice of such order—unless they are so served, or unless such a representative order is made as I have mentioned. If service upon them is dispensed with, or if under Order 16, r. 46, the Court proceeds in the absence of anyone representing them, they are not bound" (p. 353). These words, however, must now be read by the light of Order 55, r. 35 *a*, a rule introduced for the first time in November 1893, which enables the judge in person to make an order binding parties as to whom service has been dispensed with.

The effect of service is at most to place persons served with notice on the same footing as if they were defendants; they cannot be treated as co-plaintiffs, and no inquiries can be obtained in such a suit for their benefit which could not have been obtained between co-defendants (*Whitney v. Smith*, 1869, L. R. 4 Ch. 513).

The effect is to bind the interest of the party served in the subject-matter of the suit, and not to impose on him any liability to account (*Walker v. Seligmann*, 1871, L. R. 12 Eq. 152; *Latch v. Latch*, 1875, L. R. 10 Ch. 464).

Application to vary Judgment.—A party who has been served with notice of the judgment may apply within one month after service to discharge, vary, or add to the judgment (Order 16, r. 40). An addition to the judgment cannot be made, except as to something raised upon the pleadings (*Foster v. Foster*, 1867, L. R. 3 Ch. 330). The rule only applies to cases where service of an order is necessary in order to make it binding (*In re Youngs*, *Doggett v. Revitt*, 1885, 30 Ch. D. 421). It seems that the Attorney-General may apply to add to the judgment after the month (*Johnstone v. Hamilton*, 1865, 11 Jur. N. S. 777).

Where no Appearance entered.—Where a party served with notice of judgment fails to enter an appearance, he is affected with notice that all the further steps thereunder will be taken, and no further notice to him is required (*Lee v. Sturrock*, 1876, W. N. 226). Thus he need not have notice before the Master's certificate is signed (*Green v. Measures*, 1866, W. N. 122); nor be served with notice of the action being set down for hearing on further consideration (*In re Rolfe*, *Tyson v. Johnson*, 1894, 70 L. T. 624); unless, indeed, some relief be sought against him (*In re Rees*, *Rees v. George*, 1880, 15 Ch. D. 490).

Revivor.—A person served with notice of judgment, who had obtained leave to attend the proceedings, was held to be entitled to obtain an order of course to revive the action on the death of the sole plaintiff (*Burstall v. Fearon*, 1883, 24 Ch. D. 126).

Appeal.—Parties brought before the Court by service on them of notice of judgment are entitled to appeal without leave (*Ellison v. Thomas*, 1862, 1 De G., J. & S. 18; and see *Bruff v. Cobbold*, 1872, L. R. 7 Ch. 217).

Costs.—Under the former practice, where orders to attend the proceedings were required, it was held that, to entitle a person interested in an administration action to the costs of attending proceedings in chambers under the decree, he must attend by special leave of the judge, and if he attended under the common order of course and without special leave, he might be ordered to pay in addition to his own costs the extra costs occasioned by his attendance (*Sharp v. Lush*, 1879, 10 Ch. D. 468). The rule was thus stated by Jessel, M. R.: "The law stands in this way, that any persons interested who ought to be served can, under the general practice, attend, as of course, the proceedings; but that does not entitle them to the costs of attending. That is determined by the judge in chambers, who, under a general order (Cons. Order 35, r. 16), decides what parties interested in the estate shall attend the taking of the accounts at the cost of the estate; that is the subject of a special application. I cannot prevent anybody attending the proceedings; if there were fifty people, I could not prevent them instructing fifty solicitors to attend all the proceedings; but if they did, they would not only pay their own costs, where I found forty-eight of them unnecessary, but I should make them pay the extra costs occasioned by attending unnecessarily" (*Sharp v. Lush*, p. 473; and see *Day v. Batty*, 1882, 21 Ch. D. 830). See, too, *In re Taylor's Estate*, *Daubney v. Leake*, 1866, L. R. 1 Eq. 495, where it was held that in an administration suit by a residuary legatee, other residuary legatees served with notice of the decree, and having liberty to attend, would not be allowed the costs of attending the taking of the accounts in chambers unless the plaintiff and the accounting party employed the same solicitor, and in that case would be allowed one set of costs between them (see also *Hubbard v. Latham*, 1866, 14 W. R. 553; *Stevenson v. Abington* (2), 1863, 11 W. R. 936).

Under Order 55, r. 40, an order may be made for classification of the parties interested, and directing that parties in the same interest shall be represented by one solicitor for the purpose of the proceedings in chambers; and a party insisting on being represented by a different solicitor will have to pay personally the costs of his own solicitor and the further costs occasioned by such separate representation.

Parties other than those directed to attend may attend at their own expense, and upon paying the costs, if any, occasioned by such attendance, or may apply by summons for liberty to attend at the expense of the estate, or to have the conduct of the action either in addition to or in substitution for any of the parties who have been directed to attend (Order 55, r. 42).

An order is to be drawn up on a summons to be taken out by the plaintiff or party having conduct of the action, stating the parties who have been directed to attend, and such of them (if any) as have elected to attend at their own expense (Order 55, r. 43).

[*Authorities*.—*The Annual Practice*, 1898; *Daniell's Chancery Practice*, 6th ed., 1882–1884, pp. 275–282, 996–1002; *Daniell's Chancery Forms*, 4th ed., 1885, pp. 74–84; *Seton's Judgments and Orders*, 5th ed., 1893, pp. 1250, 1251.]

Notice of Motion.—See MOTION.

Notice of Trial.—*By whom given.*—Notice of trial may be given by the plaintiff or other party in the position of plaintiff. Such notice may be given with the reply (if any), whether it closes the pleadings or not, at any time after the issues of fact are ready for trial (R. S. C. 1883, Order 36, r. 11).

Where no reply is delivered by the plaintiff, he cannot give notice of trial until the expiration of twenty-one days from the delivery of the defence (*Robinson v. Caldwell*, [1893] 1 Q. B. 519); for by Order 27, r. 13, where the plaintiff does not deliver a reply within the period allowed for that purpose (that is, within twenty-one days after the defence), the pleadings are deemed to be closed at the expiration of that period.

Where the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as the Court or a judge may allow, give notice of trial, the defendant may either himself give notice of trial, or may apply to dismiss the action for want of prosecution (Order 36, r. 12).

Where under the corresponding rule of R. S. C. 1875 (Order 36, r. 4 a) an order had been made dismissing the action unless notice of trial delivered within twenty-one days, and the notice was not given within that time, the Court refused to extend the time fixed by order (*Gilder v. Morrison*, 1882, 30 W. R. 815).

The notice of trial mentioned in the rule must be an effective notice. Thus, where the plaintiff served notice of trial, but did not (as required by Order 36, r. 16) enter the trial, it was held that the defendant was entitled to move to dismiss the action for want of prosecution (*Crick v. Hewlett*, 1884, 27 Ch. D. 354). But where plaintiff had given notice of trial, but had not entered the trial, and defendant applied to dismiss the action for want of prosecution, the Court of Appeal refused to interfere with the discretion of the judge below, who had affirmed an order of the Master simply putting the plaintiff on terms to deliver notice of trial (*Siever v. Spearman*, 1896, 74 L. T. 132).

The period of six weeks mentioned in the rule is not a time appointed for doing any act or taking any proceeding within Order 64, r. 7, and consequently the Court cannot make an order giving the defendant leave to give notice of trial if the plaintiff does not give such notice within a shorter period than six weeks from the close of the pleadings (*Saunders v. Pawley*, 1885, 14 Q. B. D. 234).

Where Evidence taken by Affidavit.—Where under Order 38 evidence is taken by affidavit, notice of trial must be given at the same time after the close of the evidence as in other cases after the close of the pleadings (Order 38, r. 30).

Form of Notice.—Notice of trial must state whether it is for the trial of the cause or matter or of issues therein, and the place and day for which it is to be entered for trial (Order 36, r. 13; App. B. No. 16), (see *Harris v. Gamble*, 1878, 7 Ch. D. 877). The place of trial is to be named in the statement of claim (Order 36, r. 1), and, unless the venue has been changed, the notice will be for such place.

Length of Notice.—Ten days' notice of trial must be given, unless the party to whom it is given has consented or is under terms, or has been ordered to take short notice of trial (Order 36, r. 14). In cases of trial without pleadings under Order 18 a, the notice is a twenty-one days'

notice, which must be served within ten days after appearance (Order 18 *a*, r. 2).

Short Notice.—Short notice of trial is a four days' notice, unless otherwise ordered (Order 36, r. 14). As to short notice of trial, see Chitty's *Archb. Pr.* pp. 578, 579).

When given.—Notice of trial must be given before entering the trial; and the trial may be entered notwithstanding that the pleadings are not closed, provided that notice of trial has been given (Order 36, r. 15).

How long in force.—In London and Middlesex, unless within six days after notice of trial is given the trial is entered by one party or the other, the notice of trial is no longer in force (Order 36, r. 16). After a cause has been struck out of the Cause Book under Order 17, r. 10, the notice of trial no longer remains in force, but a fresh notice must be given (*Le Blond v. Curtis*, 1885, 33 W. R. 561).

For what Day operative.—Notice of trial for London or Middlesex must not be, nor does it operate as, for any particular sittings, but is deemed to be for any day after the expiration of the notice on which the trial may come on in its order in the list (Order 36, r. 17).

Notice of trial elsewhere than in London or Middlesex is deemed to be for the first day of the next assizes at the place for which notice of trial is given (Order 36, r. 18).

Countermand of Notice.—No notice of trial can be countermanded except by consent or by leave of the Court or a judge, which leave may be given subject to such terms as to costs, or otherwise, as may be just.

Entry of Trial by Opposite Party.—Where the party giving notice of trial for London or Middlesex omits to enter the trial on the day or day after giving notice of trial, the party to whom notice has been given may, unless the notice has been countermanded, within four days enter the trial (Order 36, r. 20).

[*Authorities.*—*The Annual Practice*, 1898; Chitty's *Archbold's Practice*, 14th ed., 1885, ch. lvii.; Daniell's *Chancery Practice*, 6th ed., 1882, pp. 669–673; Seton's *Judgments and Orders*, 5th ed., 1891, p. 130.]

Notice of Writ.—Where a plaintiff has a cause of action which can be shown to be within the provisions of Order 11, r. 1, of the Rules of the Supreme Court with regard to service out of the jurisdiction (such provisions forming a complete code on the subject, *In re Eager, Eager v. Johnstone*, 1882, 22 Ch. D. 86) against a person who is neither a British subject nor resident in British dominions, he must serve the defendant with notice of the writ and not with the writ itself (Order 11, r. 6).

The rule is in accordance with the provision to the like effect contained in sec. 19 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76). Under that Act, however, a writ might be issued for service abroad, known as a foreign writ, and notice of it given without leave of the Court, and at the risk of the plaintiff. Under the present practice, leave to serve out of the jurisdiction a writ or notice of a writ must in every case be obtained where it is desired to sue a person outside the jurisdiction (*i.e.* the territorial jurisdiction, *In re Smith*, 1876, 1 P. D. 300; *Harris v. Owners of the Franconia*, 1877, 2 C. P. D. 173). See Order 2, r. 4. The rule (Order 11, r. 6) was first introduced by the Rules of 1883, though under the code of 1875 it had previously been held that sec. 19 of the Common Law Procedure Act, 1852, was still in force (*Westman v. Aktiebolaget Ekmans Mekaniska Snickarefabrik*, 1876, 1 Ex. D. 237), and applied to the case of a writ issued

in the Chancery Division (*In re Howard, Padley v. Camphausen*, 1878, 10 Ch. D. 550).

The rule is founded on international comity, the reason for it being thus stated by Hannen, P.: "Service of process upon a foreigner not a subject of Her Majesty in another country may invite unpleasant questions of jurisdiction, whereas if it were not served upon, but only notice of the proceedings given to, such foreigner, no such consequences can arise" (*Beddington v. Beddington*, 1876, 1 P. D. 426).

In order that the Court may know whether to allow service of a writ or of notice of a writ, the affidavit in support of the application for leave to serve must state (*inter alia*) whether the defendant is a British subject or not (Order 11, r. 4). "The object of the rule was this, that if you have a British subject anywhere you may serve him with a writ; there is no objection to it whether he is residing in a foreign country or whether he is residing in a part of the Queen's dominions, but if he is not a British subject, and you want to serve him out of the Queen's dominions, you must not serve him with a writ, because most foreign countries would object to that. You must serve him with the notice which is provided for by the rules, and the object was that the Court should know whether it should direct service of a writ or service of a notice" (per Jessel, M. R., *Fowler v. Barstow*, 1881, 20 Ch. D. pp. 245, 246).

A foreign corporation resident out of the jurisdiction is as much within the rule as an individual, provided there is a cause of action against it within the provisions of Order 11 (*Westman v. Aktiebolaget, etc.*, 1876, 1 Ex. D. 237; *Scott v. Royal Wax Candle Co.*, 1876, 1 Q. B. D. 404); and *Ingate v. Austrian Lloyds Co.*, 1858, 4 C. B. N. S. 704, decided to the contrary under the old practice, is no longer good law. A foreign corporation having a branch office in this country, managed by a head officer or clerk, may be served with an ordinary writ (*Newby v. Van Oppen*, 1872, L. R. 7 Q. B. 293; *Haggin v. Comptoir D'Escompte de Paris*, 1889, 23 Q. B. D. 519).

Any attempt to make a foreign sovereign or State amenable to the jurisdiction of our Courts would be offensive to the spirit and principles of international law, and therefore a foreign sovereign or State cannot be served with a writ or other process of our Courts (*Strousberg v. Republic of Costa Rica*, 1880, 29 W. R. 125). The notice must be served in the same manner as a writ of summons (Order 11, r. 7).

Service of a writ instead of notice of it upon a foreigner not in British dominions is a nullity, and cannot be cured as an irregularity under Order 70, r. 2 (*Hewitson v. Fabre*, 1888, 21 Q. B. D. 6). The doubt expressed by Wills, J., in that case, whether appearance by the defendant would not amount to a waiver, appears to be settled by the later decisions; and it would seem to be now clear that an unconditional appearance, or one without protest, would amount to such a waiver (*Firth v. De Las Rivas*, [1893] 1 Q. B. 149; *Western National Bank of City of New York v. Perez*, [1891] 1 Q. B. 304; and see *Manitoba and North-West Land Corporation v. Allan*, [1893] 3 Ch. 432).

An omission to copy in the notice the order giving leave to issue the writ and serve notice of it, is not such an informality as to render the service invalid (*Reynolds v. Coleman*, 1887, 36 Ch. D. 453).

It seems that leave to serve notice of motion for an injunction cannot be given at the same time as leave is given to serve notice of a writ (*Manitoba and North-West Land Corporation v. Allan*, [1893] 3 Ch. 432).
SEE SERVICE OUT OF THE JURISDICTION.

[*Authorities.*—*The Annual Practice*, 1898; Chitty's *Archbold's Practice*,

14th ed., 1885, pp. 244–249; Daniell's *Chancery Practice*, 6th ed., 1882, pp. 341–343; Seton's *Judgments and Orders*, 5th ed., 1891, p. 19.]

Notice to Admit.—For the purpose of saving the serious expense which would be caused if the parties to an action were required to prove by strict evidence all the points of their case, the Court constantly proceeds on admissions by the parties, and the Rules of the Supreme Court, 1883, contain various provisions on the subject. Thus any party to a cause or matter may give notice by his pleading or otherwise, in writing, that he admits the truth of the whole or any part of the case of any other party (Order 32, r. 1). Such admissions may be either on the pleadings, or in answer to interrogatories, or they may be made by agreement between the parties, or after notice to admit given by one party to the other. This article deals only with admissions obtained by means of notice. Such admissions may be (a) of Facts, (b) of Documents.

(a) *Notice to admit Facts.*—Any party may, by notice in writing, at any time not later than nine days before the day for which notice of trial has been given, call on any other party to admit, for the purposes of the cause, matter, or issue only, any specific fact or facts mentioned in such notice; and in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court or a judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter, or issue may be, unless at the trial or hearing the Court or judge certify that the refusal to admit was reasonable, or unless the Court or judge shall at any time otherwise order or direct. Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter, or issue, and not as an admission to be used against the party on any other occasion, or in favour of any person other than the party giving the notice; provided also that the Court or a judge may at any time allow any party to amend or withdraw any admission so made on such terms as may be just (Order 32, r. 4). For form of notice, see App. B. No. 12; and for form of admissions, App. B. No. 13.

The notice may be delivered even before defence (*Crawford v. Chorley*, 1883, W. N. 198). It cannot be set aside by the Court as embarrassing or improper (S. C.).

(b) *Notice to admit Documents.*—Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such documents shall be paid by the party so neglecting or refusing, whatever the result of the cause or matter may be, unless at the trial or hearing the Court shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense (Order 32, r. 2). This rule is taken from, and is identical in terms with, sec. 117 of the Common Law Procedure Act (15 & 16 Vict. c. 76). The same power was conferred on the Court of Chancery by sec. 7 of the Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27).

“The notice is intended to secure admissions with regard both to original documents in the possession of the party serving the notice, and to original documents not in his possession, but of which he has copies” (*Wills on Evidence*, p. 267).

It has been held that the notice extends to every document which a

party proposes to adduce in evidence, and is not confined to documents in his custody or control (*Rutter v. Chapman*, 1841, 8 Mee. & W. 388).

A party who proposes to give in evidence a document at the trial is bound, in every case, in order to entitle himself to the costs of proving it, to afford the other party an opportunity of admitting it, notwithstanding the document is put in issue on the pleadings, and although an admission has been refused on the ground that the document was a forgery (*Spencer v. Barough*, 1842, 9 Mee. & W. 426). The notice should be given a reasonable time before the trial (*Tynn v. Billingsley*, 1835, 3 Dowl. 810).

Form of Notice.—A form of notice is provided in the rules (Order 32, r. 3; App. B. No. 11).

Costs of Notice where Documents unnecessary.—If a notice to admit comprises documents which are unnecessary, the costs occasioned thereby must be borne by the party giving such notice (Order 32, r. 9).

Proof of Signature to Admissions.—An affidavit of the solicitor or his clerk of the due signature of any admissions made in pursuance of any notice to admit documents or facts, is sufficient evidence of such admissions, if evidence thereof is required (Order 32, r. 7).

Effect of Admissions.—A party who has been called upon to admit a document before trial, and has done so, cannot at the trial object to produce such document on the ground that it has an interlineation not accounted for by evidence, unless it appears the interlineation was made after the admission (*Freeman v. Steggall*, 1849, 14 Q. B. 202); and an admission of a document as of a certain date will preclude the party from asking for an explanation if the date appears to be written on an erasure (*Poole v. Palmer*, 1842, Car. & M. 69).

Where plaintiff gave notice to admit a counterpart of a lease, and the document was admitted as being such counterpart, but at the trial it turned out to be a lease, though stamped only as a counterpart, it was held that the party giving the admission was precluded from taking the objection (*Doe d. Wright v. Smith*, 1838, 8 Ad. & E. 255).

“The reservation ‘saving all just exceptions’ imports that the admission which is asked is required only in order to dispense with the proof necessary for the adduction of the document in evidence, if otherwise admissible. The party giving the admission will remain entitled to object that it is not relevant, or that it is not an admissible medium of proof of the fact sought to be proved by it” (Wills on *Evidence*, p. 267).

In an action on a bill of exchange against the acceptor, to which the defendant pleaded *non acceptavit*, plaintiff gave in evidence a letter signed by defendant’s attorney admitting without qualification the acceptance to be in the handwriting of the defendant. It was held that there was evidence to go to the jury of defendant’s acceptance without production of the bill (*Chaplin v. Levy*, 1854, 9 Ex. Rep. 531); but where the admission is made “saving all just exceptions,” a party by admitting his handwriting to a bill of exchange is not precluded from objecting to the sufficiency of the stamp (*Vane v. Whittington*, 1843, 2 Dowl. N. S. 757).

Where there was an admission of a document as a true copy, it was held that this did not authorise giving in evidence such copy without further proof of the original, though notice had been given to produce the original, it not being proved that plaintiff had such original (*Sharpe v. Lamb*, 1840, 11 Ad. & E. 805).

An admission cannot be withdrawn, and will bind the party on a new trial (*Doe d. Wetherell v. Bird*, 1835, 7 Car. & P. 6). If a defendant desires that admissions made on a former trial should not be used on a new trial, he

should apply to a judge for permission to withdraw them (*Elton v. Larkins*, 1832, 5 Car. & P. 385).

Admissions between Co-Defendants.—Admissions between co-defendants, to which the plaintiff is not a party, cannot be entered as evidence against the plaintiff, and therefore cannot be included in an order for taxation and payment of the general costs of the suit (*Dodds v. Tuke*, 1884, 25 Ch. D. 617).

Marking Documents.—No documents are evidence unless they are put in at the trial. The mere fact that they are admitted in the admissions does not make them evidence. Every document which it is intended to use in evidence ought to be formally put in, and (in the Chancery Division) marked by the registrar (*Watson v. Rodwell*, 1878, 11 Ch. D. 153; and see Memorandum, Seton, p. 143).

Admissions to be filed.—No judgment or order wherein any written admissions of evidence are entered as read are to be passed, until such written admissions of evidence have been filed in the Central Office, or district registry, as the case may be, and a note thereof made on the judgment or order by the proper officer (Order 61, r. 15).

Costs.—As to the costs to which the rule applies, see *Rutter v. Chapman*, 1841, 8 Mee. & W. p. 391. The judge refused to certify for costs of proving documents which were not receivable in evidence (*Phillips v. Harris*, 1843, Car. & M. 492). The party refusing to admit is not liable for costs of proof if the document was not proved at the trial (*Doe d. Peters v. Peters*, 1844, 1 Car. & Kir. 279).

[*Authorities.*—*The Annual Practice*, 1898; Chitty's *Archbold's Practice*, 14th ed., 1885, chs. xlv., xlv.; Chitty's *Forms*, 12th ed., 1883, pp. 258–268; Daniell's *Chancery Practice*, 6th ed., 1882, pp. 605, 607; Daniell's *Chancery Forms*, 4th ed., 1885, pp. 264–268; Day's *Common Law Procedure Acts*, 4th ed., 1872, pp. 138–141; Seton's *Judgments and Orders*, 5th ed., 1891, pp. 142, 143; Taylor on *Evidence*, 9th ed., 1895, pp. 472 *et seq.*; Wills on *The Theory and Practice of the Law of Evidence*, 1894, pp. 267, 268.]

Notice to Produce.—(a) *At the Trial.*—In order that a party may be able at the trial or hearing of any cause or matter to give secondary evidence of a document in the possession of his opponent, he must serve a Notice to Produce such document. If the document be not produced pursuant to such notice, upon proof of service of the notice, and of the document being in the possession of the party served therewith, secondary evidence may be allowed.

The true principle on which a notice to produce a document on the trial of the cause is required is not to give the opposite party notice that such a document will be used by a party to the cause in order to enable him to prepare evidence to explain or confirm the document, but is merely to give him a sufficient opportunity to produce it, and thereby to secure, if he pleases, the best evidence of its contents (*Dwyer v. Collins*, 1852, 7 Ex. Rep. 639).

It is not possible within the limits of this article to enumerate the cases in which it is, and those in which it is not, necessary to give a notice to produce. The reader is referred on that subject to the various works on Evidence, and to Chitty's *Archbold's Practice*, pp. 484–486. It may, however, be stated that it is a ruling principle that, where from the nature of the proceedings the party in possession of the document has notice that he is charged with the possession of it, notice to produce need not be given (*How*

v. *Hall*, 1811, 14 East, 274; *Scott v. Jones*, 1813, 4 Taun. 865; and see the notes to *R. v. Elworthy*, 1867, 37 L. J. M. C. 3, in vol. xi. of *Ruling Cases*, pp. 447-449).

The original document must be shown to be in the hands of the party to whom the notice is given (*Sharpe v. Lamb*, 1840, 11 Ad. & E. 805; *Harvey v. Mitchell*, 1841, 2 Moo. & R. 366), or in the hands of a person on his behalf (*Evans v. Sweet*, 1824, Ry. & M. 83; *Taplin v. Atty*, 1826, 3 Bing. 164; *Parry v. May*, 1833, 1 Moo. & R. 279; see the cases collected in Chitty's *Archbold's Practice*, pp. 486, 487).

Form of Notice.—A form of notice to produce is provided by the Rules of the Supreme Court, 1883 (Order 32, r. 8; App. B. No. 14). The notice must be in writing (Order 66, r. 1). It should be drawn with sufficient particularity to give the party on whom it is served correct information as to the document he is required to produce. A notice to produce "all and every letters written by the plaintiff to the defendant, relating to the matters in dispute in the action," was held sufficient to let in secondary evidence of a particular letter, though it did not specify the date of such letter (*Jacob v. Lee*, 1837, 2 Moo. & R. 33; *Conybeare v. Farries*, 1869, L. R. 5 Ex. 16). So, in an action for work and labour done, a notice to produce "all accounts relating to the matters in question in this cause" was held sufficient to let in secondary evidence of an account of work done, given by the plaintiffs to the defendant, without specifying it by date or otherwise (*Rogers v. Costance*, 1839, 2 Moo. & R. 179; see also *France v. Lucy*, 1825, Ry. & M. 341; *Jones v. Edwards*, 1825, McCle. & Yo. 139). If a notice to produce comprises documents which are not necessary, the costs occasioned thereby must be borne by the party giving the notice (Order 32, r. 9).

Service of Notice.—The notice should be served on the solicitor of the opposite party (*Houseman v. Roberts*, 1832, 5 Car. & P. 394), or on the party himself, and good service on a party is not invalidated by subsequent insufficient service on the solicitor (*Hughes v. Budd*, 1840, 8 Dowl. 315). The notice should be served a reasonable time before the trial. Whether a notice is served in time is peculiarly a question for the judge at the trial (*George v. Thompson*, 1836, 4 Dowl. 656). As to what notice is sufficient, see *George v. Thompson* (*ubi supra*); *Atkins v. Meredith*, 1836, 4 Dowl. 658; *Lloyd v. Mostyn*, 1842, 2 Dowl. N. S. 476; *Gibbons v. Powell*, 1840, 9 Car. & P. 634; *Sturge v. Buchanan*, 1839, 10 Ad. & E. 598; *Bryan v. Wagstaff*, 1825, 2 Car. & P. 126; *Howard v. Williams*, 1842, 9 Mee. & W. 725; *Foster v. Pointer*, 1841, 9 Car. & P. 718; *Combs v. Bristol and Exeter Rwy. Co.*, 1858, 1 F. & F. 206. The principle to be gathered from all the cases is that the notice must be given in sufficient time to enable the party served with the notice to make effectual search for and procure the document required; and this will depend upon the facts of each case (*Lawrence v. Clark*, 1845, 14 Mee. & W. 250). Where a document is shown to be in Court at the time of the trial, it may be called for immediately, though no notice to produce has been served (*Dwyer v. Collins*, 1852, 7 Ex. Rep. 639).

A notice to produce upon the trial of the cause applies not merely to the trial which it immediately precedes, but to every subsequent trial which may take place (*Hope v. Beadon*, 1851, 2 L. M. & P. 593).

Proof of Service.—An affidavit of the solicitor or his clerk of the service of a notice to produce, and of the time when it was served, with a copy of the notice to produce, is in all cases sufficient evidence of the service of the notice, and of the time when it was served (Order 32, r. 8). It is not necessary to give notice to produce the notice to produce (*Philipson v. Chase*, 1809, 2 Camp. 110; 11 R. R. 678).

(b) *Notice to Produce for Inspection*.—Every party to a cause or matter is entitled, at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice will not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the Court or a judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the Court or judge shall deem sufficient for not complying with such notice, in which case the Court or judge may allow the same to be put in evidence on such terms as to costs and otherwise as the Court or judge shall think fit (Order 31, r. 15). The notice may be given at any time (*Smith v. Harris*, 1883, 48 L. T. 869; *Quilter v. Heatley*, 1883, 23 Ch. D. 42).

“There is a broad distinction between a general application for discovery of documents relating to the matters in question in the action and an application for production of documents referred to in the pleadings. These rules were evidently intended to give the opposite party the same advantage as if the documents referred to had been fully set out in the pleadings” (per Lindley, L.J., *Quilter v. Heatley* (*ubi supra*), p. 49).

The right to discovery is not altered or intended to be altered by this rule, the right of discovery is not enlarged, and therefore the right to protection on any ground of privilege remains where it was when the question is a question of discovery. The rule does not take away the privilege of the documents, but only prevents them from being put in evidence unless produced (*Roberts v. Oppenheim*, 1884, 23 Ch. D. 724).

Particulars (*Cuss v. Fitzgerald*, 1884, W. N. 18); an affidavit in answer to interrogatories (*Moore v. Peachey*, [1891] 2 Q. B. 707); and an affidavit not filed, but of which a copy had been given to the other side (*In re Fenner and Lord*, [1897] 1 Q. B. 667), have been held to be within the rule.

Form of Notice.—A form is given in the Rules of the Supreme Court, 1883 (Order 31, r. 16; App. B. No. 9). The very words need not be followed (*In re Credit Co.*, 1879, 11 Ch. D. 256).

Time for Inspection after Notice.—The party to whom the notice is given must within two days from the receipt of the notice, if all the documents therein referred to have been set forth by him in an affidavit of documents under rule 13, or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within four days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, or in the case of bankers' books or other books of account, or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. A form of notice is provided (Order 31, r. 17; App. B. No. 10).

Order for Inspection.—If the party served with notice omits to give such notice of a time for inspection, or objects to give inspection, or offers inspection elsewhere than at the office of his solicitor, the Court or judge may, on the application of the party desiring it, make an order for inspection in such place and in such manner as he may think fit; provided that the order shall not be made when and as far as the Court or a judge

shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs (Order 31, r. 18). See EVIDENCE.

[*Authorities.*—*The Annual Practice*, 1898; Best on *Evidence*, 8th ed., 1893, pp. 199, 421; Chitty's *Archbold's Practice*, 4th ed., 1885, pp. 484–490, 505–507; Daniell's *Chancery Practice*, 6th ed., pp. 604, 1840; Day's *Common Law Procedure Acts*, 4th ed., 1871, pp. 141, 143; Powell on *Evidence*, 6th ed., 1892, pp. 625–633; *Ruling Cases*, 1897, vol. xi. pp. 441–449; Taylor on *Evidence*, 9th ed., 1895, pp. 310 *et seq.*; Wills on *The Theory and Practice of the Law of Evidence*, 1894, pp. 249, 250, 283, 284.]

Notice to Quit.

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Nature.—When a tenancy is of a “periodic” nature, that is to say, when it repeats itself, while the holding continues, from period to period, and one of the parties wishes to put an end to it without the consent of the other, the proper procedure is by notice to quit. It does not apply in the case of a tenancy for a term which is certain, nor to one the term of which, though it may be uncertain in the first instance, becomes definite on the happening of a particular circumstance or event (*Cobb v. Stobes*, 1807, 8 East, 358; 9 R. R. 466; *Doe v. Smith*, 1805, 6 East, 530). Analogous to a notice to quit, however, is the notice that must be given to determine a tenancy which, though expressed to endure for a fixed period in the first instance, may be determined at stated intervals, as in the ordinary case where a lease for twenty-one years may be put an end to at the end of the seventh or fourteenth year. In this case a notice must be given, by the party who wishes to take advantage of the privilege, in strict accordance with the terms in which it is granted (*Right v. Cuthell*, 1804, 5 East, 491; 7 R. R. 752); and if the lease is silent as to the length of the notice, a “reasonable” notice must still be given (*Goodright v. Richardson*, 1789, 3 T. R. 462).

Notice to quit need only be given to determine the relation of *landlord and tenant*. Where, for instance, a servant is required to occupy premises belonging to his master in order that he may perform his duties, there is no tenancy created between the parties, because no possession in the legal sense is conveyed. Consequently no notice to quit is necessary in such case where the employment is determined. The right of occupation thereupon ceases; and it is even immaterial that the giving of a specified notice should have been made the subject of express stipulation between the parties, though of course an action will lie on the contract if the terms of the notice be departed from (*Mayhew v. Suttle*, 1854, 4 El. & Bl. 347). The same thing applies where the claim of a person to oust a tenant is by title paramount to that of the latter's own landlord, as in the case of a mortgagee (apart from the provisions of the Conveyancing Act) as against the mortgagor's tenant after mortgage, the tenant as against him being only in the position of a trespasser (*Keech v. Hall*, 1778, 1 Doug. 21; 1 Sm. L. C. 494 (10th ed.)). As between the mortgagor and mortgagee themselves, the former, if allowed to remain in possession, being at best a tenant at sufferance, cannot claim the benefit of notice to quit unless where, by the payment of rent *as rent*, a new tenancy should have been created between the parties. Even where by an attornment clause the relation of landlord

and tenant is created between them by force of the rent being made payable yearly, and recoverable by distress, the mortgagor will not be entitled to notice to quit where, upon his default, a right of re-entry has been reserved to the mortgagee (*Doe v. Tom*, 1843, 4 Q. B. 615; *Metropolitan Counties, etc., Society v. Brown*, 1859, 4 H. & N. 428); for the object in creating a tenancy here is not to benefit the mortgagor, but to give the mortgagee a right to distrain for his interest (per Pollock, C.B., in *Metropolitan Counties, etc., Society v. Brown*, *supra*).

Apart from the above cases, which may be regarded as in a measure exceptional, there is no doubt that it may be stated as a general rule that some notice is required before a periodic tenancy can be brought to an end. And the assignment, whether of the reversion or of the term, by the death of either party or otherwise, will make no difference as regards the right to such notice to persons who succeed to the interest (*Gulliver v. Burr*, 1766, 1 Black. W. 596; *Maddon v. White*, 1789, 2 T. R. 159; 1 R. R. 453; *Doe v. Samuel*, 1804, 5 Esp. 173; 8 R. R. 845).

Length.—The length of a notice to quit, as one of its main incidents, depends on and is regulated by one or more of the following considerations: (1) express stipulation; (2) custom; (3) common law; (4) statute.

(1) *Contract.*—By express stipulation or contract the parties may do what they please. Notice to quit may be dispensed with altogether (*Bethell v. Blencowe*, 1841, 3 Man. & G. 119), or may be made of any length that may be thought desirable (*In re Threlfall*, 1880, 16 Ch. Div. 274; *King v. Eversfield*, [1897] 2 Q. B. 475), so long as, where it has to be given by the lessor, it does not exceed the period of the tenancy itself, for such a notice would be repugnant to the nature of the estate granted by the tenancy (*Doe v. Browne*, 1807, 8 East, 165; 9 R. R. 397; *Tooker v. Smith*, 1857, 1 H. & N. 732). So it may be provided that a notice may only be given by either or both of the parties upon the fulfilment of a specified condition, as in the not uncommon case where it may only be given by the lessee if he duly performs all the covenants and obligations of the lease (*Grey v. Friar*, 1854, 4 H. L. C. 565). Another very common stipulation is for six *calendar* months' notice, and, as in every such case, full weight is attached to what has been made the subject of special agreement between the parties (*Quartermaine v. Selby*, 1889, 5 T. L. R. 223). A word may here be said as to the effect of an arrangement during actual currency of a tenancy, by which the parties expressly agree to substitute a notice different (usually less) in length for the notice which, whether by agreement or by law, each party is entitled to receive from the other. Provided that what has taken place is not equivalent to a surrender, such an agreement does not bind either of the parties, and the fact that it may have been acquiesced in and even acted upon is held to be immaterial (*Johnstone v. Hudlestone*, 1825, 4 Barn. & Cress. 922; 28 R. R. 505; *Doe v. Johnston*, 1825, 1 M'Cle. & Yo. 141; *Bessell v. Lansberg*, 1845, 7 Q. B. 638).

(2) *Custom.*—If no stipulation on the subject of notice to quit is shown to have been arrived at, its length may depend upon local custom (*Tyley v. Seed*, 1696, Skin. 649; *Roe v. Charnock*, 1790, Peake, 6; 3 R. R. 643); provided always that such custom be capable of being established by evidence in conformity with the rules recognised by law (see *Wigglesworth v. Dallison*, 1779, 1 Sm. L. C. 528, 10th ed., and notes thereto).

(3) *Common Law.*—In yearly tenancies the length of notice to quit is half a year, however the rent by the terms of the tenancy may be made payable (*Right v. Darby*, 1786, 1 T. R. 159; 1 R. R. 169). Where

the tenancy commences on a day other than the four usual quarter days (Ladyday, Midsummer, Michaelmas, and Christmas), the half-year's notice must be a full half-year, that is to say, the number of days must be counted, excluding the day on which the notice is given (*Quartermaine v. Selby, supra*) and including the day on which the notice is expressed to expire, and that number must not fall short of the number, *i.e.* 182, which constitute half a year in computation of law (*Co. Litt.* 135 *b*; notes to *Duppa v. Mayo*, 1668, 1 Wms. Saund. 380, ed. 1871). Where, however, the tenancy is made to commence, as it does in most cases, on one of the four regular quarter days, only a *customary* half-year's notice need be given, that is to say, it must be given on or before one of such quarter days for the second succeeding quarter day, whatever the actual number of intervening days may be (*Howard v. Wemsley*, 1806, 6 Esp. 53; 9 R. R. 806; *Roe v. Doe*, 1830, 6 Bing. 574; 31 R. R. 499; *Morgan v. Davies*, 1878, 3 C. P. D. 260). In the case of periodic tenancies which are less than yearly tenancies, the length of notice necessary is not so clear, though there is no doubt that such notice need in no case exceed the period of the tenancy itself. In quarterly tenancies probably a full quarter's notice is necessary; but whether in monthly or weekly tenancies less than a month's or a week's notice may not be sufficient, if found as a matter of fact to be reasonable, may be regarded as still an open question (*Jones v. Mills*, 1861, 10 C. B. N. S. 788; *Bowen v. Anderson*, [1894] 1 Q. B. 164).

(4) *Statute*.—In the case of yearly tenancies under the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61, s. 33), it is provided that where a half-year's notice is "by law" necessary and sufficient for its determination, a year's notice is, by virtue of the Act, to be necessary and sufficient for the same, in the absence of a written agreement between the parties that this provision is not to apply, when a half-year's notice is to remain sufficient. It will be observed that this provision only deals with the case where a half-year's notice is necessary and sufficient by law, and is consequently not held to apply to a yearly tenancy made determinable upon six months' notice by express contract or agreement (*Wilkinson v. Calvert*, 1878, 3 C. P. D. 360; *Barlow v. Teal*, 1885, 15 Q. B. D. 501).

Form.—No particular form is required for a notice to quit, nor need it necessarily be in writing, though it had better in every case be so, in order to avoid the troubles and difficulties which otherwise arise. It should be addressed to the person who, as will be presently explained, is the person legally entitled to receive it. It need not state, if addressed to the tenant, the person to whom the possession is to be given; though, if this statement be given and be incorrect, the notice may be held bad (*Doe v. Fairclough*, 1817, 6 M. & S. 40); nor need a notice be addressed at all if it be proved to have been correctly delivered, in accordance with what will be said presently on the subject of service (*Doe v. Wrightman*, 1801, 4 Esp. 5; 6 R. R. 834). So a mistake in the name of a person addressed may be waived by evidence showing that he accepted it without objection, and that he could not have been misled by it (*Doe v. Spiller*, 1807, 6 Esp. 70; 9 R. R. 810). In the next place, the premises affected by the notice must be correctly described, though a description in general terms will be sufficient (*Doe v. Milward*, 1838, 3 Mee. & W. 328; *Doe v. Forwood*, 1842, 3 Q. B. 627); and, as in the last case, unless the recipient was misled, misdescription will be immaterial (*Doe v. Wilkinson*, 1840, 12 Ad. & E. 743). It must, however, be observed that, in the absence of special arrangement in the lease, a notice extending to only part of the demised premises, which

are demised at an entire rent, will be invalid (*Doe v. Archer*, 1811, 14 East, 245; 12 R. R. 509; *Prince v. Evans*, 1874, 27 L. T. 835). But, by the Agricultural Holdings Act (46 & 47 Vict. c. 61, s. 41), a landlord who has demised premises within the scope of that Act to a tenant from year to year, if he wishes to devote a portion of the lands included in the demise to specified purposes connected with their improvement, is allowed to act contrary to this rule, though the tenant may, on the other hand, on receipt of such notice, elect to treat it as for the entire holding, if within twenty-eight days after its service he give a counter notice in writing to that effect.

In the next place, the notice should, of course, be couched in clear and intelligible terms, so as to leave no doubt in the mind of the person who receives it as to the intention to determine the tenancy (*Gardner v. Ingram*, 1889, 61 L. T. 729); though a notice, which in itself may be imperfect within this rule, may be validated by conduct on the part of the recipient showing that he accepted it as a good notice (*General Assurance Co. v. Worsley*, [1895] 64 L. J. Q. B. 235). Thus, for instance, a notice conveying a pure option cannot operate as a valid notice to quit (*Ahearn v. Bellman*, 1879, 4 Ex. D. 201); nor can a notice conditional upon something happening or being done by the recipient before the time fixed for its operation (*Muskett v. Hill*, 1839, 5 Bing. N. C. 694; *Farrance v. Elkington*, 1811, 2 Camp. 591; 11 R. R. 807). A notice, however, though in form conditional, may in substance be equivalent to an offer of a fresh tenancy, and when such is the case it will not necessarily be invalidated (*Bury v. Thompson*, [1895] 1 Q. B. 231, 696; *Ahearn v. Bellman*, *supra*); and where to a notice otherwise valid is added a mere warning as to the consequences of not complying with it, its validity is not impaired (*Doe v. Jackson*, 1779, 1 Doug. 175).

Lastly, and this is the most important point, and one by reason of non-compliance with which most notices fail, a notice to quit must always be expressed to expire at the proper time, that is to say, where there is no agreement or custom to the contrary (see *Doe v. Hulme*, 1828, 2 Man. & R. 433), on and with the last day of some period of the tenancy. If given to expire on a wrong day, a notice will be invalid (*Doe v. Lea*, 1809, 11 East, 312; *Simmons v. Underwood*, 1897, 76 L. T. 777); and neither party will be bound by it, even though accepted as valid, unless the circumstances amount to a surrender (*Doe v. Milward*, 1838, 3 Mee. & W. 328; *Brown v. Burtinshaw*, 1826, 7 Dow. & Ry. 603). If a tenancy from year to year commences on one of the usual quarter days, the notice must be expressed to expire on such day; if on some other day, it should be expressed to expire on the day before the anniversary of its commencement, though it will not be invalid if expressed to expire on the anniversary itself (*Sidebotham v. Holland*, [1895] 1 Q. B. 378). Where a tenant enters in the middle of the quarter, and agrees to pay a proportionate sum by way of rent for the broken quarter, and afterwards on the regular quarter days, the notice must be expressed to expire on the first of such quarter days, for the tenancy is deemed, for the purposes of notice to quit, to commence with that day (*Doe v. Johnson*, 1806, 6 Esp. 10; 9 R. R. 800; *Doe v. Stapleton*, 1828, 3 Car. & P. 275). And the same thing applies where the broken quarter is disregarded, and the first payment of rent is agreed to be made on the next quarter day but one after the entry (*Sandill v. Franklin*, 1875, L. R. 10 C. P. 377), unless the demise itself provides that the commencement of the tenancy is the time of entry (*Sidebotham v. Holland*, *supra*).

As an illustration of the general rule, it may be mentioned that, under

an agreement for a yearly tenancy, where it was stipulated that the tenant should quit at a quarter's notice, a stipulation which the parties were perfectly competent to make (see *supra*, and *King v. Eversfield*, [1897] 2 Q. B. 475), it was held that the necessary notice, which was shortened by the special contract between the parties, must still be given to expire with the end of the year (*Doe v. Donovan*, 1 Taun. 555). But the general rule may be displaced, and it is a question of construction if the parties have displaced it (*Doe v. Grafton*, 1852, 18 Q. B. 496, explained in *King v. Eversfield*, *supra*; *Bridges v. Potts*, 1864, 17 C. B. N. S. 314). In the case of a yearly tenancy implied from the acceptance of rent by the landlord from a tenant who holds over after the expiration of a lease, such new tenancy is deemed to commence at the same time as the old; and it makes no difference whether the rent reserved be the same as that reserved in the lease or not (*Roe v. Ward*, 1789, 1 Black. H. 97; 2 R. R. 728; *Doe v. Samuel*, 1804, 5 Esp. 173; 8 R. R. 845; *Berrey v. Lindley*, 1841, 3 Man. & G. 498; *Humphreys v. Franks*, 1856, 18 C. B. 323; *Kelly v. Patterrson*, 1874, L. R. 9 C. P. 681). But the above inference may be sometimes displaced as matter of law (see *Doe v. Lines*, 1848, 11 Q. B. 402; *Corbett v. Plowden*, 1884, 25 Ch. D. 678). Where a demise provides that a tenancy is to commence at different times with regard to different portions of the premises, the notice should be expressed to expire with the determination of the interest in that portion which is the principal subject-matter of the demise (*Doe v. Snowden*, 1779, 2 Black. W. 1224; *Doe v. Spence*, 1805, 6 East, 120; 8 R. R. 422; *Doe v. Watkins*, 1806, 7 East, 551; 8 R. R. 670; *Doe v. Howard*, 1809, 11 East, 498; 7 R. R. 255; *Doe v. Hughes*, 1840, 7 Mee. & W. 139).

The difficulties dealt with in the foregoing observations are usually circumvented by using, in conjunction with the naming of a particular day, some general expression which will cover the right day, in case the particular one named be wrong, *e.g.* "at such time as the tenancy shall expire next after the expiration of half a year from the service of the present notice"; and this course it will always be prudent to pursue. It may be added that a notice to quit may be vitiated, though expressed to expire on the right day, by naming some hour (other than midnight) at which the quitting is to take place (*Page v. More*, 1850, 15 Q. B. 684).

Service.—Sometimes a lease mentions upon what persons notice to quit is to be served, and then its terms must be strictly followed. Thus, where a demise provided that the notice should be delivered to the tenant or his assigns, it was held that notice served on an under-tenant was invalid, though the tenant had himself absconded, and was not to be found (*Hogg v. Brooks*, 1885, 15 Q. B. D. 256). In the case of a lease to joint-tenants, it seems doubtful whether it is sufficient to serve the notice on one of them without proving that the other or others have had it communicated to them (*Doe v. Crick*, 1803, 5 Esp. 196; 8 R. R. 848; *Doe v. Watkins*, 1806, 7 East, 551; 8 R. R. 670). Notices under the Agricultural Holdings Act may be served on the addressees, either personally or at their last known place of abode in England, or through the post in a registered letter; if so sent by post they are deemed to have been served at the time when the letter would be delivered in ordinary course; and service is sufficiently proved by showing that the letter was properly addressed and posted, and that it contained the notice (46 & 47 Vict. c. 61, s. 28). It is thought that notices to quit (see s. 33) are notices within the scope of this section.

The notice should be served either personally or by delivery to an agent. If sent through the post, the presumption will be made that it is delivered

in the ordinary course, though such presumption may be rebutted by evidence to the contrary (*Gresham House Co. v. Rossa Grande Gold Co.*, 1870, W. N. p. 119; *Papillon v. Bruntton*, 1860, 5 H. & N. 518). If delivered to an agent he must, of course, be one duly authorised to receive documents of the kind, and this, like other questions of agency, is a question of fact. It will, however, be implied as a matter of law, in the case where the notice is served upon the wife or servant of a tenant at the house where he resides, even if such house form no part of the demise; though the implication thus arising can be rebutted by evidence, showing that, *so far as the question of agency was concerned*, it was incorrectly made (*Tanham v. Nicholson*, 1872, L. R. 5 H. L. 561). In the face of this decision, the doctrine of the older cases, that the landlord had done all that was necessary when he left the notice with a servant at the tenant's house, or when he showed that it had reached the tenant's hands, if it had been merely left at the house, and not with a servant there, can probably now no longer be maintained (*Jones v. Marsh*, 1791, 4 T. R. 464; 2 R. R. 441; *Alford v. Vickery*, 1842, Car. & M. 280).

In the case of an incorporated company, notice to quit may either be served by post in a letter directed to the principal office, or personally upon the secretary (8 & 9 Vict. c. 16, s. 135). The service of a notice in the case of a corporation generally should be upon its officers (*Doe v. Woodman*, 1807, 8 East, 228; 9 R. R. 422). Where the notice is properly served, no explanation of its contents is necessary (see *Liddy v. Kennedy*, 1871, L. R. 5 H. L. 134). It is usual to indorse a memorandum of service upon a duplicate, so that in case of the death of the server the indorsement may be produced in evidence (see *Doe v. Turford*, 1832, 3 Barn. & Adol. 890; *Doe v. Somerton*, 1845, 7 Q. B. 58)—a thing which will be permitted if the memorandum has been made in the ordinary course of business (*Stapylton v. Clough*, 1853, 2 El. & Bl. 933). Due service, however, may in some cases be proved by statements or conduct on the part of the person who has received the notice (*Doe v. Hall*, 1843, 5 Man. & G. 795).

Parties.—(1) On the part of the landlord:—Notice on the side of the lessor should be given, either by him or by the person for the time being entitled to the immediate legal reversion expectant on the lease or tenancy. If the lessors are joint-tenants, notice to quit by one, in the absence of words in the demise requiring it to be given by all, will determine the tenancy as to all, at all events if expressed to be given on behalf of all, and probably if not so expressed (*Doe v. Summersett*, 1830, 1 Barn. & Adol. 135). Where the demise is by tenants in common, each may give a good notice as to his undivided share (*Cutting v. Derby*, 1776, 2 Black. W. 1075). As in all similar cases, any stipulation existing in a lease as to the person entitled to give notice to quit to the tenant will have to be obeyed. Where, however, a lessor had made an assignment to himself and another person as tenants in common, it was held that notice in the names of both was well given, though power to give it was reserved only to the lessor (*Liddy v. Kennedy*, *supra*).

Notice by the lessor may of course be given on his behalf by a duly authorised agent (see *Jones v. Phipps*, 1868, L. R. 3 Q. B. 567); and if such agent have a general power to manage the property of which the demised premises form part, he may give it in his own name (*ibid.*). For example, a receiver, with a general power of letting, appointed by the Court (*Doe v. Read*, 1810, 12 East, 157), or an agent with power to let premises and to

receive rent (*Doe v. Mizem*, 1837, 2 Moo. & R. 56), as distinguished from a mere collector of rents, has such general authority. It would seem that the agent must be duly authorised at the moment at which the tenant is served with the notice; and that where he is not so authorised, a subsequent ratification by the lessor will be ineffectual, and *a fortiori* where it takes place after the time at which it would have been necessary to give it if given by the lessor himself (*Doe v. Walters*, 1830, 10 Barn. & Cress. 626; *Doe v. Goldwin*, 1841, 2 Q. B. 143).

Notice must be given to the lessor's immediate tenant, or his personal representative or assignee, but it will be presumed for the purposes of this rule that a person found in occupation of demised premises is an assignee until shown that he is only an under-tenant, notice to whom is unnecessary and improper (*Pleasant v. Benson*, 1811, 14 East, 234; 12 R. R. 507; *Doe v. Williams*, 1826, 6 Barn. & Cress. 41; 30 R. R. 244; *Roe v. Street*, 1834, 2 Ad. & E. 329). Following the usual rule, any stipulation contained in the demise as to the persons entitled to receive notice must be carefully observed (see *Hogg v. Brooks*, 1885, 15 Q. B. D. 256).

(2) On the part of the tenant:—Notice on the part of the tenant must, of course, be given by him, and where the tenants are more than one, the intention that it should operate on the part of all of them should be expressed (*Easton v. Penny*, 1892, 67 L. T. 290). It must be given to the party for the time being entitled to the immediate legal reversion, *e.g.* where the landlord during the tenancy has mortgaged his interest, the notice to quit should in general be given to the mortgagee; though it is apprehended that notice to the mortgagor will be good where he is entitled for the time being to receive the rent, and no intimation has been given by the mortgagee of an intention to take possession or to enter into the receipt of rents and profits (see Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 25, subs. 5). Where given to an agent, evidence of his authority should be forthcoming if necessary (*Pearse v. Boulter*, 1860, 2 F. & F. 133). As in the last case, any provision in the instrument of tenancy as to the persons to whom notice ought to be given by the tenant must be strictly followed (*Quartermaine v. Selby*, 1889, 5 T. L. R. 223; *Easton v. Penny*, *supra*).

Waiver.—When the notice to quit has been once given, it cannot be waived or revoked, and it will operate accordingly when it expires to determine the tenancy (*Tayleur v. Wildin*, 1868, L. R. 3 Ex. 303); but of course there is nothing to prevent the parties from agreeing upon a new tenancy to commence from that time. Where no actual quitting takes place, and acts have been done by the parties after the expiration of the notice which show that their intention was that the relation of landlord and tenant should continue to exist between them, the notice is generally said to have been “waived.” But though the new tenancy is on the terms of the old one, it must be borne in mind that it *is* a new tenancy, a circumstance which may have an important bearing on the rights or liabilities of third parties, as in the case of a surety for the due observance of the covenants on the part of the tenant (*Holme v. Brunskill*, 1878, 3 Q. B. D. 495; *Tayleur v. Wildin*, *supra*). The question whether a notice has been waived or not is thus seen to depend primarily upon the intention which may be attributed to the parties through their acts. The mere fact of holding over on the part of the tenant after he has given a notice to quit is not necessarily a waiver, for he may be holding over as a mere trespasser (*Jenner v. Clegg*, 1832, 1 Moo. & R. 213), or temporarily by mere inadvertence (*Gray v. Bompas*, 1862, 11 C. B. N. S. 520); but it is some evidence from which waiver may

be implied as an inference of fact (*Jones v. Shears*, 1836, 4 Ad. & E. 832). Similarly, where the notice is on the part of the landlord, and the tenant remains in possession in disregard of it, it is clear that the former cannot be taken to have waived the notice without other evidence establishing an agreement for a new holding (*Alford v. Vickery*, 1842, Car. & M. 280; *Whiteacre v. Symonds*, 1808, 10 East, 13; 10 R. R. 224). The most ordinary way in which a notice to quit is waived is by the payment and acceptance of a sum of money as rent accruing due after the expiration of the notice. It must, however, be clear that such payment and acceptance have been made of rent as rent, that is to say, of a sum of money paid by a tenant to his landlord in respect of demised premises (*Doe v. Batten*, 1775, Cowp. 243; *Goodright v. Cordwent*, 1795, 6 T. R. 219; 3 R. R. 161; *Doe v. Calvert*, 1810, 2 Camp. 389; 11 R. R. 745). A mere demand for payment not acceded to by the tenant is not in itself sufficient (*Blyth v. Dennett*, 1853, 13 C. B. 178). Where such demand, however, is enforced by distress, the landlord, who has thereby done an act only consistent with the existence of the tenancy, cannot be heard to dispute his intention to waive the notice (*Zouch v. Willingale*, 1790, 1 Black. H. 311; 2 R. R. 770); but where his right of distress is disputed by the tenant, the implication of an agreement for a new tenancy may be rebutted (*Panton v. Jones*, 1813, 3 Camp. 372; 14 R. R. 757).

Waiver of a notice will also be presumed by the giving of a second notice for a date subsequent to the first (*Doe v. Palmer*, 1812, 16 East, 53; 14 R. R. 284). This presumption, however, is also capable of rebuttal, and will be rebutted by showing facts which are inconsistent with the intention on the part of the landlord to treat the tenancy as still on foot, *e.g.* the prior commencement of an action of ejectment (*Doe v. Humphreys*, 1802, 2 East, 237); and where the second notice is in effect a demand of possession, the doctrine does not apply (*Messenger v. Armstrong*, 1785, 1 T. R. 53; 1 R. R. 148; *Doe v. Steel*, 1811, 3 Camp. 115; 13 R. R. 768).

Notice to Treat.—The first step taken by promoters who intend to put in force compulsory powers under the Lands Clauses Acts (see vol. vii. at p. 274).

Noting (of Bills of Exchange).—See vol. ii. p. 104; PROTEST.

Not Less.—See TIME.

Not Negotiable.—See CHEQUE (4) (5); NEGOTIABLE INSTRUMENT.

Not to my Knowledge.—A trustee who is applied to for information with regard to incumbrances on his trust fund is not bound to answer. An answer in the above form, when the trustee has no knowledge of incumbrances, or has had notice of some, but has forgotten about them, will not place the trustee under any liability (*Low v. Bouverie*, [1891] 3 Ch. 82).

When a purchaser makes a proper requisition on a question of fact, *e.g.* whether an incumbrance has been paid off, he should not be satisfied with this answer by the vendor's solicitor. The latter is bound to apply to his client for information before he answers the requisition, and, if necessary, to search amongst the title deeds (see Sugden, *Vendor and Purchaser*, p. 416).

Nor is the above answer sufficient when a party to an action is interrogated as to matters presumably or admittedly done or omitted to be done by his agents or servants, or in their presence, in the ordinary course of their employment. The party interrogated must use his best efforts *bonâ fide* to get the information from his agents or servants (*Bolckow v. Fisher*, 1882, 10 Q. B. D. 171).

Notwithstanding.—This word is frequently found in Acts of Parliament in such phrases as “notwithstanding anything in this Act” (see the Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60, s. 663 (2)), “notwithstanding anything in this Act, or any repeal enacted by this Act” (see the Metropolitan Police Courts Act, 1897, 60 & 61 Vict. c. 26, s. 7 (3)), “notwithstanding anything in any other Act” (see the Locomotives on Highways Act, 1896, 59 & 60 Vict. c. 36, s. 6 (2)), or “notwithstanding anything contained in the Arbitration Act, 1889, or in any other Act” (see the Building Societies Act, 1894, 57 & 58 Vict. c. 47, s. 20; *cp.* s. 8 (1)). In these cases the word conveys the meaning that the Acts specified or indicated shall not prove an impediment to the particular enactments contained in the sections in which it occurs, and shall not be citable by way of argument against measures taken in pursuance of such enactments. The meaning is the same as that of the words “as if the Act had not been made” in the second saving clause of the Statute of Uses, 27 Hen. VIII. c. 10 (see *Chenie's case*, cited in *Cecil's case*, 1597, 7 Co. Rep. 20). Like the above phrases are such saving clauses as: “nothing in this Act shall affect” (see the Merchant Shipping Act, *supra*, ss. 710, 745, 746; *cp.* 500, 501), “nothing herein contained shall affect” (see the Merchant Shipping Act, *supra*, s. 691 (4)), “nothing in this section shall affect” (see the Finance Act, 1894, 57 & 58 Vict. c. 30, s. 41 (4)), or “nothing in this Act shall be construed to take away or affect the right” (see the Prevention of Cruelty to Children Act, 1894, 57 & 58 Vict. c. 41, s. 24). On the other hand, we may have “subject to any special provisions of this Act” (see the Merchant Shipping Act, *supra*, ss. 680 (1) and 683 (1) (2)). In all the first-mentioned cases stress is laid upon particular provisions, to the exclusion of other Acts or portions of Acts. As to the effect of the word “notwithstanding” in deeds or agreements, see *Dodd v. Whelan*, 1897, 1 Ir. Rep. 575. (See also NON OBSTANTE; PROVIDED.)

Nova Scotia.—See CANADA.

Novation.—1. The substitution of a new debtor by a tripartite agreement that he shall undertake the debt and become liable to the creditor, and that the latter shall discharge the old debtor, is called a novation (see per Lord Selborne in *Scarfe v. Jardine*, 1882, 7 App. Cas. at p. 351). The inquiry whether there has been a novation usually resolves itself into two questions: (a) has the new debtor taken over the liability? (b) has the

creditor accepted him *instead* of the old debtor? The first question is usually determined by express agreement between the old and the new debtor. The answer to the second has frequently to be inferred from the conduct of the new debtor and of the creditor, but both questions may turn upon inference (*Rolfe v. Flower*, 1865, L. R. 1 P. C. 27). The reported cases in which novations have been suggested are principally cases where the business of a company dealing in annuities or in policies of insurance has been transferred to another company (below, 2), or cases in which a partner has died or retired, and other partners have carried on the business (below, 3). The principles to be deduced are of general application, but it is convenient to state the decisions separately.

2. No release can be inferred unless the creditor had full knowledge of the change (*Manchester, etc., Association*, 1870, L. R. 5 Ch. 640; *Conquest's* case, 1875, L. R. 1 Ch. D. 334). If the creditor has expressly refused to accept the sole liability of the new company, very strong circumstantial evidence is needed to show that he has in fact accepted it (*In re Smith, Knight, & Co.*, 1869, L. R. 4 Ch. 662; *Griffith's* case, 1871, L. R. 6 Ch. 374). In any event, if the new debtor is a company (and the contract something more than a trade debt), cogent proof of intention to release the old company is necessary (*Family Endowment Society*, 1869, L. R. 5 Ch. 118; cp. below, 3). The mere acceptance of interest (*In re Smith, Knight, & Co.*, *supra*), or payment of annuity (*Family Endowment Society, supra*; *India, etc., Life Assurance Co.*, 1872, L. R. 7 Ch. 651), is not sufficient. The payment of premiums to the new company for a long time is evidence of an intention to look to it only (see *National Provincial Life Association*, 1870, L. R. 9 Eq. 306; 6 Ch. 393; *Griffith's* case, *supra*; and see the conflicting views of Lords Cairns and Romilly and of Lord Westbury as to the importance to be attached to such payments, Buckley on the *Companies Acts*, 7th ed., p. 403 *et seq.*). A claim against the new company (*National Provincial Life Association, supra*), or the indorsement by it of the policy with the holder's consent (*Ex parte Blood*, 1870, L. R. 9 Eq. 316; *Miller's* case, 1876, 3 Ch. D. 391), will be almost conclusive in favour of novation. So also will be the acceptance of benefits under the arrangement from the new company (*Spencer's* case, 1871, L. R. 6 Ch. at p. 370; *Anchor Assurance Co.*, 1870, L. R. 5 Ch. 632; *Cocker's* case, 1876, 3 Ch. D. 1). By the Life Assurance Companies Act, 1872 (s. 7), it is now provided that the release of a transferring or amalgamating company must be effected by a writing signed by the policy-holder.

Cases in which the society has power to transfer its liability without the policy-holder's consent, *e.g.* where its funds only are liable (*Hort's* case, 1875, 1 Ch. D. 307; *Dowse's* case, 1876, 3 Ch. D. 384), and cases where the holder is bound by the vote of a meeting (*Merchants', etc., Society*, 1870, L. R. 9 Eq. 694; *Harman's* case, 1875, 1 Ch. D. 326), are not really cases of novation.

3. An agreement by a creditor to look to a new debtor, and by the latter to pay, is not void for want of consideration (*Thompson v. Percival*, 1834, 5 Barn. & Adol. 925; *Lyth v. Ault*, 1852, 7 Ex. Rep. 669). Where the creditor knows of a change in a partnership firm and continues to deal with the new partners, making no claim upon the retiring partner or his estate for a long while, a novation is readily inferred (*Rolfe v. Flower*, 1865, L. R. 1 P. C. 27; *Hart v. Alexander*, 1837, 7 Car. & P. 746; on appeal, 2 Mee. & W. 484; *Bilborough v. Holmes*, 1876, 5 Ch. D. 255; *Oakeley v. Pasheller*, 1836, 4 Cl. & Fin. 207, as explained by Lindley, *Partnership*, p. 252; see *Rouse v. Bradford Bank, infra*; Mr. Leake says there is a presumption in favour of a

novation, *Contracts*, 3rd ed., p. 686). But mere knowledge that a partner has retired, and that the continuing partners, with or without a new partner, have agreed to discharge the debts, is not sufficient to effect a novation (Lindley on *Partnership*, 5th ed., p. 243), even though the creditor has treated the new partner as a debtor (*ibid.*, p. 247; *Harris v. Farwell*, 1851, 15 Beav. 31; see *Keay v. Fenwick*, 1876, 1 C. P. D. 745). Taking a bill from the new firm is not conclusive (*loc. cit.*; *Swire v. Redman*, 1875, 1 Q. B. D. 536), but is strong evidence of novation (*Evans v. Drummond*, 1801, 4 Esp. 89; *Swire v. Redman*, 1875, 1 Q. B. D. 536; cp. *In re Head*, No. 1, [1893] 3 Ch. 426, cited vol. i. p. 481, where a fresh deposit note was accepted, but the retired partner was not released). So also is a proof in the bankruptcy of the new firm (see *Bilborough v. Holmes*, *supra*).

4. *Surety*.—The release by novation of the original debtor of course releases his sureties (*Commercial Bank of Tasmania v. Jones*, [1893] App. Cas. 313). A retired partner is in the position of a surety after notice to the creditor of the retirement, and he may be released by time being given to the new firm (*Rouse v. Bradford Bank*, [1894] App. Cas. 586), unless he has authorised the firm to make the arrangement in question (*loc. cit.*).

5. *The renewal of a bill of exchange* is not a novation of the renewed bill, unless by special agreement, or unless the latter is given up (*Ex parte Barclay*, 1802, 7 Ves. 597; Chalmers on *Bills of Exchange*, 5th ed., p. 224).

[*Authorities*.—Lindley on *Partnership*, 5th ed., p. 239; Buckley on the *Companies Acts*, 7th ed., p. 403; Leake on *Contracts*, 3rd ed., p. 684; Pollock on *Contracts*, 6th ed., p. 191. See also ACCORD AND SATISFACTION.]

Novelty.—See DESIGNS ; PATENTS.

Now.—Sec. 24 of the Wills Act, 1837 (1 Vict. c. 26), enacts that every will, as regards real and personal property comprised in it, is to be construed and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appear by the will. The use of the word “now” in describing such property frequently shows such a contrary intention if it is an essential and vital part of the description; in such a case the word refers to the date of the will. On the other hand, the description, *e.g.* “now in my occupation,” may be an additional incidental description merely, not vital or essential, and accordingly insufficient to qualify the generality of the previous words and exclude the application of the primary rule that “the will speaks from death.”

As instances of “now” being held sufficient to show a contrary intention, see the cases *Hutchinson v. Barrow*, 1861, 6 H. & N. 583 (“my messuage or dwelling-house, with the buildings belonging thereto, *now occupied by me*, situate at W.”); *Williams v. Owen*, 1863, 2 N. R. 585 (a bequest of a house, described as “the house I now live in,” held to refer to the house as occupied by the testatrix at the time of making her will, not as occupied at her death, and to include a garden originally attached to the house, but subsequently given up); and *Goodland v. Burnett*, 1855, 1 Kay & J. 341.

In view of the Wills Act, the provisions of which every testator is presumed to know, the Courts require very clear evidence of intention to refer the bequest or devise to the date of the will; and in the majority of cases, and particularly the more recent cases, the tendency has been to treat the part of the description that contains the word *now* as incidental only. We may take as instances: a gift by a testator of “all my ready money, bank and

other shares, and any other property I may now possess," passes personal estate acquired subsequently to the date of the will (*Wagstaff v. Wagstaff*, 1869, L. R. 8 Eq. 229). And this construction is more favoured still in cases of gifts of residue. And the words "I now possess," and the like, are held in such cases to mean the same thing as "my." And "when I refer to a particular thing, such as a ring or a horse, and bequeath it as 'my ring,' or 'my horse' . . . there might be considerable difficulty in saying that the contrary intention, to which the [Wills] Act in its 24th section refers, does not appear on the face of the will; but when a bequest is of that which is generic,—of that which may be increased or diminished,—then . . . the Wills Act requires something more on the face of the will, for the purpose of indicating such contrary intention, than the mere circumstance that the subject of the bequest is designated by the pronoun *my*" (*Goodland v. Burnett*, *loc. cit.*, p. 348). And even where a testator recited that his son was "now indebted" to him in various sums, and bequeathed to him the said moneys, and released him from all claims in respect thereof, and all other moneys due from him, it was held that the will must be construed as speaking from death, and that the son was released from paying moneys advanced subsequently to the date of the will. See also *In re Ord*, *Dickinson v. Dickinson*, 1879, 12 Ch. D. (C. A.) 22, and the two recent cases *In re Champion-Dudley v. Champion*, [1893] 1 Ch. (C. A.) 101, and *In re Seal*, *Seal v. Taylor*, [1894] 1 Ch. (C. A.) 316. In the former case it was held that a devise of a cottage, with all the land thereto belonging, "and now in my occupation," passed two pieces of land bought subsequently to the date of the will, and occupied by him at the time of his death, with the cottage; and see the judgment of North, J., as to the distinction between phrases of this class, according to whether they are a mere additional description which, though inaccurate, is not vital, or they are an essential part of the gift, so as to constitute as a whole a gift of that class of property only.

Noxious Plants.—A person who cultivates noxious plants is bound to take all reasonable precautions to prevent their causing injury to his neighbour, by projecting over land of a neighbour, or by knowingly letting their clippings fall on such land (*Wilson v. Newberry*, 1871, L. R. 7 Q. B. 31; *Crowhurst v. Amersham Burial Board*, 1878, 4 Ex. D. 5).

But this does not *per se* create any obligation to fence the land on which they grow, or to take any other precaution to prevent trespass by other persons or their animals (*Erskine v. Adeane*, 1873, L. R. 8 Ch. 756, 763; *Ponting v. Noakes*, [1894] 2 Q. B. 281).

An agister of cattle must, however, not introduce noxious plants or their clippings on the land on which the agistment is, or he may be liable for injury thereby to the agisted cattle.

The same duty does not arise as to noxious plants which are the natural product of the soil, nor even to those unintentionally introduced with seed of cultivated plants (*Giles v. Walker*, 1889, 24 Q. B. D. 656).

Nor on the demise of land is there any implied warranty that there is no noxious plant growing on the land demised (*Erskine v. Adeane*, 1873, L. R. 8 Ch. 756, 761). As to the criminal use of noxious plants, see POISON.

Nudum pactum.—See CONTRACT, vol. iii. p. 339; MAXIMS, LEGAL, vol. viii. at pp. 288, 294.

Nue propriété—A term met with in cases involving French law, meaning the ownership without the usufruct or liferent. The nearest equivalent in English legal phraseology is reversion.

Nuisance.

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Definition.—This term is applied to divers subjects, and it is difficult to give a short definition of its legal meaning which shall at the same time be exhaustive. It may be divided into two main headings, viz. (1) public nuisances which injuriously affect the welfare of the community, and are dealt with by or in the name of the Crown, or by corporate bodies specially authorised by statute to intervene; and (2) private nuisances which specially affect individual persons or their property, and for the suppression of which the individuals aggrieved are entitled to invoke the assistance of the Courts. These divisions are not exhaustive, and to some extent overlap each other; for the same act may often cause a public nuisance and also cause special damage to individuals. But the appropriate remedy frequently depends on the way in which the act causing the nuisance is regarded. It may be laid down as a general rule that private individuals, as such, cannot merely for their own benefit successfully invoke the aid of the law against a public nuisance; but if they can show that the act complained of is a nuisance causing special injury to themselves or their property, apart from the injury to the public generally, the Courts will protect them.

Public Nuisance.—A public nuisance is an offence against the public, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do anything which the common good requires (and which they are bound to do) (Hawk., P. C. bk. i. c. 75); or, as it was put in the Criminal Code Bill of 1880, s. 146, "an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property, or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all Her Majesty's subjects." A nuisance, to be considered public, must therefore (a) actually affect a large number of people, or (b) interfere with rights which members of the community might otherwise enjoy.

Acts, therefore, which seriously interfere with (a) the health, or (b) the convenience of the public generally, or (c) which tend to degrade public morals, have always been considered nuisances, for the suppression of which the Courts would interfere. Such nuisances may be dealt with whenever they become objectionable, for "none can prescribe to make a common nuisance, for it cannot have a lawful beginning by licence or otherwise, being an offence at common law" (*Dewill v. Saunders*, 1618, Cro. (2) 490).

The following are usually considered and dealt with as public nuisances:—

(1) Obstruction of highways, bridges, and navigable rivers. Such obstructions may be active, by placing dangerous objects in or near to the highway, etc.; or passive, by non-repair or non-removal of such objects (Hawk., P. C. cc. 76, 77). See HIGHWAYS.

(2) Carrying on any trade or manufacture which is dangerous or offensive to the public. Such trades are also subject now to special statutory regulations. See ALKALI WORKS; CHEMICAL PROCESS; OFFENSIVE TRADES.

(3) Polluting water, so as to affect the public health or comfort (*R. v. Medley*, 1834, 6 Car. & P. 292). Such nuisances are further the subject of special statutory provisions. See RIVERS POLLUTION and WATER SUPPLY.

(4) Exposing persons infected with a contagious disease in a public place (*R. v. Vantandillo*, 1815, 4 M. & S. 73; 16 R. R. 389).

(5) Disorderly houses. This term includes brothels, gaming or betting houses, places for lotteries, unlicensed places of entertainment, and places opened so as to offend against the Sunday Observance Act (21 Geo. III. c. 49) (*Hawk.*, P. C. cc. 74 and 78).

(6) Acts of indecency or disgusting exhibitions (not necessarily indecent) in a public place.

Private Nuisances.—Private nuisances are acts, not in themselves necessarily wrongful, but the consequences of which are prejudicial to the plaintiff's person, house, land, etc. (*Reynolds v. Clarke*, 1725, 8 Mod. 272). If the act complained of is wrongful in itself, the remedy in the old days of strict pleading was by action of trespass; but in many cases where such an action would not lie, protection might be invoked by an action on the case, where it could be shown that the defendant's conduct or use of his property caused substantial injury to the plaintiff. Proof of substantial injury is essential to the maintenance of an action (*St. Helens Smelting Co. v. Tipping*, 1863, 11 H. L. 642). To constitute a private nuisance, it is sufficient that the act complained of should be such as materially to interfere with the ordinary comfort of human existence, according to plain, sober, and simple notions among English people (*Walter v. Selfe*, 1851, 4 De G. & Sm. 315; *Crump v. Lambert*, 1867, L. R. 3 Eq. 409). There are, however, many minor discomforts with which people, especially in towns, must put up, unless they become intolerable from their continuance or unreasonable exercise. Whether or not a particular nuisance is actionable is frequently a question of degree (*Gaunt v. Finney*, 1872, L. R. 8 Ch. 8).

Among acts considered as private nuisances may be reckoned—

(1) Interference with the water in a stream, or defined channel, by abstracting it or unduly raising its temperature, so as to prejudice riparian owners lower down its course (*Mason v. Hill*, 1833, 5 Barn. & Adol. 1; *Swindon Waterworks Co. v. Wilts and Berks Canal Co.*, 1875, L. R. 7 H. L. 697). Water percolating underground may be abstracted with impunity (*Chasemore v. Richards*, 1849, 7 H. L. 349; *Bradford v. Pickles*, [1895] App. Cas. 587).

(2) Fouling water, whether on the surface or below ground (*Wood v. Waud*, 1849, 3 Ex. 779; *Ballard v. Tomlinson*, 1885, 29 Ch. D. 115). See further RIVERS POLLUTION.

(3) Removing the support to which land is entitled in its natural state, by mining under it or by excavations near it. Until subsidence follows, no cause of action arises (*Darley Main Colliery Co. v. Mitchell*, 1886, 11 App. Cas. 127). Causing a subsidence by pumping out water is not, however, actionable in most districts (*Popplewell v. Hodgkinson*, 1869, L. R. 4 Ex. 248). In districts where this is likely to happen from brine-pumping, there are statutory provisions for granting compensation to innocent persons who may be injuriously affected by reason of such pumping (54 & 55 Vict. c. 40). See MINES AND MINERALS, vol. viii. at p. 416.

(4) Interference with the accustomed access of light and air to windows

and buildings which have acquired a prescriptive right to such access (*Kelt v. Pearson*, 1871, L. R. 6 Ch. 811; *Parker v. First Avenue Hotel Co.*, 1883, 24 Ch. D. 282).

(5) Use of property so as to cause substantial discomfort to neighbours, as by causing offensive smells (*Bamford v. Turley*, 1860, 3 B. & S. 62); by covering them with smoke (*Crump v. Lambert*, 1867, L. R. 3 Eq. 409); by making unreasonable noises, especially during the night (*Ball v. Ray*, 1873, L. R. 8 Ch. 467; *Broder v. Saillard*, 1876, 2 Ch. D. 692); by using a building in such a way as to alarm those in its vicinity, as by collecting infectious patients in a hospital (*Metropolitan Asylums Board v. Hill*, 1881, 6 App. Cas. 193); by allowing water to drip from eaves or trees (*Tod Heatley v. Benham*, 1888, 40 Ch. D. 80).

(6) User of a highway or waterway, so as to interfere with its use by others or to injure adjoining property. General obstruction of a highway is a *public* nuisance, to abate which proceedings on behalf of the public ought usually to be taken. If, however, an individual suffers pecuniary damage as a direct consequence of such obstruction, he may maintain an action as for a private nuisance (*Metropolitan Board v. McCarthy*, 1874, L. R. 7 H. L. 243; *Lyon v. Fishmongers' Co.*, 1876, 1 App. Cas. 662). Thus an action lies against a person who allows or places a source of danger, such as an excavation in (*Barnes v. Ward*, 1850, 9 C. B. 392), or a heap of stones or log on, a highway, so as to interfere with those who lawfully use it (*Tucker v. Axbridge Highway Board*, 1888, 53 J. P. 87), or so near it that another person can move it into a place where it becomes dangerous (*Clarke v. Chambers*, 1878, 3 Q. B. D. 327); who allows any part of his premises adjoining a highway to become ruinous, so as to fall on and injure passers-by (*R. v. Watts*, 1702, 1 Salk. 357); who leaves an unfenced excavation immediately adjoining a highway (*Hardcastle v. South Yorkshire Rwy. Co.*, 1859, 4 H. & N. 67); or who places a dangerous fence by the side of a highway in places where it becomes a nuisance to a highway. (BARBED WIRE fencing may now, by Statute 56 & 57 Vict. c. 32, be summarily removed). So also it is an actionable nuisance to place on or close to a highway any unusual object calculated to frighten horses on the highway (*Wilkins v. Day*, 1883, 12 Q. B. D. 110; *Brown v. Eastern and Midland Rwy. Co.*, 1889, 22 Q. B. D. 391).

Surveyors of highways, and the public bodies who now have their duties and responsibilities imposed on them by statute, are liable for injuries caused by their misfeasance (*White v. Hindley Board*, 1874, L. R. 10 Q. B. 219). But if the ground of complaint is that they have omitted to execute works or do repairs necessary to keep the highway in a proper state, no action lies (*Young v. Davis*, 1862, 7 H. & N. 760; *Cowley v. Newmarket Board*, [1895] App. Cas. 345).

Statutory Sanction.—Acts which would otherwise amount to nuisances, whether common or merely private, are often authorised by the words of a statute. For instance, to break up or place any permanent obstruction in a public highway is *prima facie* a nuisance. But statutory powers have been given in many cases to do this, to railway and tramway companies, and for the purpose of laying gas or water mains, electric light cables, and telegraph and telephone poles and wires. The consent of the authority having control of the highway to the mode of so obstructing the road must generally be first obtained. If the statutory conditions are not complied with, the work is unauthorised, and the persons causing it are liable. But if the statute, by express words or by necessary implication, does sanction the act which causes the nuisance, all remedy, whether by indict-

ment or action, is taken away, provided that reasonable precautions, consistent with the exercise of the statutory powers, have been taken to prevent injuries occurring (*R. v. Pease*, 1832, 4 Barn. & Adol. 30; *London, Brighton, etc., Rwy. Co. v. Truman*, 1885, 11 App. Cas. 45). The Courts, however, are careful to see that authority to commit the nuisance complained of is expressly given or necessarily implied from the words of the statute in question. If such authority is not so given, an action may be successfully brought against the corporation causing the nuisance (*Powell v. Fall*, 1880, 5 Q. B. D. 597; *Rapier v. London Tramways Co.*, [1893] 2 Ch. 588). Even where the statute does authorise a nuisance, the persons so authorised are responsible if they exercise their powers negligently, and without taking reasonable precautions to prevent damage resulting therefrom (*Vaughan v. Taff Vale Rwy. Co.*, 1860, 5 H. & N. 679; *Jolliffe v. Wallasey Board*, 1874, L. R. 9 C. P. 62).

Offensive Trades.—Certain trades are from their nature liable to cause nuisances to the neighbourhood where they are carried on. In many cases they are subject to special statutory regulations. See ALKALI WORKS; CHEMICAL PROCESS; etc.

Some trades are defined by sec. 112 of the Public Health Act, 1875, to be OFFENSIVE TRADES (*q.v.*), and may not be newly established in an urban district without the consent in writing of the local authority. If established before the date of the statutory prohibition, they may be carried on as heretofore, but this does not authorise their being carried on in such a way as to be a nuisance at common law (*R. v. Watts*, 1826, 2 Car. & P. 486; 31 R. R. 687).

Locality.—Whether these or like acts are actionable nuisances depends somewhat on the locality where they are carried on. The mere fact, for instance, that an offensive trade is carried on in a place where it is convenient for the public to have it, is no answer to an action by person who has been injured (*Bamford v. Turley*, 1860, 3 B. & S. 62; *Shotts Iron Co. v. Inglis*, 1882, 7 App. Cas. 518). But what may be a nuisance in one place is not necessarily so in another. Where there are several works near together, all of which produce noise or offensive vapour, etc., it may be very difficult to prove that the nuisance from which the plaintiff suffers is due to any one, and thus he may fail (*Sturges v. Bridgman*, 1879, 11 Ch. D. 865; *St. Helens Smelting Co. v. Tipping*, *supra*). But if he can show that the thing complained of is itself a nuisance, he should succeed. The mere fact that nuisances of a similar character already exist in the neighbourhood does not justify the establishment of fresh ones, so as to increase the total (*A.-G. v. Leeds*, 1870, L. R. 5 Ch. 583). Nor does the fact that the nuisance is produced for the benefit of the public, or of a large section of it (unless in the exercise of statutory powers, *vide infra*) (*R. v. Ward*, 1836, 4 Ad. & E. 384; *A.-G. v. Birmingham*, 1858, 4 Kay & J. 528).

If a nuisance is substantial, the mere fact that it is only temporary is no answer to an action for damages (*Bamford v. Turley*, *supra*); though it may be a ground on which the Courts may refuse to grant an injunction to prevent its continuance (*Swaine v. G. N. Rwy. Co.*, 1864, 4 De G., J. & S. 211; *Harrison v. Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409).

Prescription.—A right to commit a private nuisance may be acquired by prescription as an easement (*Murgatroyd v. Robinson*, 1857, 7 El. & Bl. 391; *Lord Leconfield v. Lord Lonsdale*, 1870, L. R. 5 C. P. 657; *Sturges v. Bridgman*, 1879, 11 Ch. D. 852). But if the nuisance injuriously affects the public, no prescription will make it lawful (*Dewill v. Saunders*, 1618, Cro. (2) 490; *R. v. Cross*, 1812, 3 Camp. 224), as it is an offence at common law.

Nor can the Crown by grant entitle any person to commit a public nuisance, *e.g.* to obstruct an existing right of way. The grant must be subject to the rights of the public, if any (*A.-G. v. Burridge*, 1822, 10 Price, 350; 24 R. R. 705).

Legal Proceedings.—In case of a public nuisance, the remedy must be sought by proceedings instituted on behalf of the public, *i.e.* by indictment or by an information in the name of and sanctioned by the Attorney-General. Any person may put the criminal law in motion against an alleged offender, and may therefore apply for an indictment against those whom he charges with causing a nuisance. In case of most nuisances the proceedings are under the common law, and not regulated by statute. The informer may in such cases prefer his bill direct to the Grand Jury, at assizes or Quarter Sessions, without any preliminary proceedings before justices, and without any leave from the presiding judge. He is, however, liable personally for all costs, if he proceeds in this way. If the Grand Jury find a true bill, notice is given to the defendant, and the case is tried at a subsequent assize. Some common law misdemeanours, such as nuisances to highways, etc., are triable at Quarter Sessions. If there is a conviction, the Court may impose such fine as it deems suitable, and may also as part of its judgment order the nuisance to be abated (*Hawk.*, P. C. c. 75, s. 14). Sentence is frequently suspended in order to give the defendant an opportunity of abating the nuisance. Where this has been done, either before or after verdict, and no real inconvenience has been caused to the public, a nominal fine, with or without costs, is considered to meet the justice of the case. But where the nuisance has been continued and has caused serious injury, a heavy penalty might be imposed.

An individual who, or whose property, is injured in consequence of a private nuisance has his remedy by action, in which he may claim an injunction to prevent the continuance or recurrence of the nuisance, and may also claim damages for any loss he has himself sustained. If, however, he puts the law in force on behalf of the public, the proceedings must be in their name, *i.e.* by indictment or information. An aggrieved individual may of course act as relator.

Though the nuisance is of a public nature, still an individual who, as a direct consequence of a public nuisance, suffers special damage more than the rest of the public, may nevertheless bring his own action in respect of that special damage (*Iveson v. Moore*, 1698, Raym. (Ld.) 486; *Benjamin v. Storr*, 1873, L. R. 9 C. P. 400; *Lyon v. Fishmongers' Co.*, 1876, 1 App. Cas. 662). But if he merely suffers inconvenience in common with other members of the public, he has no private right of action; but if he takes any proceedings, must take them on behalf of the public. Thus no action lies for non-repair of a highroad (*Cowley v. Newmarket Board*, [1895] App. Cas. 345); though it does for placing a dangerous obstruction in or near a highway, whereby any individual sustains an injury (*R. v. Watts*, 1697, 1 Salk. 357; *White v. Hindley Board*, 1875, L. R. 10 Q. B. 219). The action may be brought in the County Court if large damages are not claimed. That Court can grant an injunction against a nuisance (*Martin v. Bannister*, 1879, 4 Q. B. D. 491).

An information by the Attorney-General is a civil proceeding, commenced by writ and tried in the ordinary way. It may be instituted by him of his own motion; but more usually is initiated by some person aggrieved, who as relator asks for the sanction of the Attorney-General (see O. S. C. 16, r. 20). If the Attorney-General is simply proceeding on behalf of the public, the result of a successful information is an injunction to restrain the continuance of the nuisance (*A.-G. v. Shrewsbury Bridge Co.*, 1882,

21 Ch. D. 752); but a claim for damages by the relator may be joined with the claim for an injunction, and an action commenced by an individual on his own behalf may by amendment be turned into an action and information in which the two claims are joined (*Caldwell v. Pagham Harbour Co.*, 1876, 2 Ch. D. 221).

Proceedings by Local Authorities.—The Public Health Act, 1875, gives local sanitary authorities large powers of dealing summarily with nuisances in or near their district (*infra*). Sec. 107 provides that if in their opinion summary proceedings would afford an inadequate remedy, they may cause any proceedings to be taken against any person in any superior Court of law or equity to enforce the abatement or prohibition of any nuisance under the Act. The meaning of this provision is that a local authority may take such proceedings as are known to the law for the purpose. They cannot therefore sue in their own name, unless the nuisance affects them as a corporation, *e.g.* by injuring their property; but must proceed by indictment or sue in the name and with the sanction of the Attorney-General (*Tottenham Urban District Council v. Williamson*, [1896] 2 Q. B. 353). They may, like any individual, act as relators in an action brought by the Attorney-General; and, if aggrieved themselves, may join a claim in their corporate capacity for damages, just as an aggrieved individual might (*A.-G. v. Logan*, [1891] 2 Q. B. 100).

Sec. 334—a saving clause—declares that nothing in the Act shall be construed to extend to mines, or to certain processes, such as smelting ores, etc., so as to obstruct or interfere with their working. The meaning of this section, which is copied from earlier Acts, was for a long time doubtful; but it seems now clear that it only exempts mine owners, etc., from the special liabilities created and penalties imposed by that Act. It does not relieve them from liability for a public nuisance (*A.-G. v. Logan*, [1891] 2 Q. B. 100), nor even from proceedings under the Act, if the nuisance could be prevented without obstructing the efficient working of the mine (*Patterson v. Chamber Colliery Co.*, 1892, 8 T. L. R. 278).

Summary Remedy.—Proceedings by indictment or information or by action are often too expensive and dilatory to afford an adequate means of dealing with a nuisance which may be serious, but still does not affect anyone sufficiently to induce him to embark in possibly prolonged litigation. In some cases Parliament has provided a remedy by means of summary procedure before magistrates. Unless, however, a case can be brought within the provisions of some Act authorising such a course, the party aggrieved can only protect himself by the means recognised and provided by the common law.

Many local Acts, some passed long ago and others in comparatively recent times, have given special powers for dealing with specific nuisances within the districts to which those Acts applied. The powers so given, of course, vary in the terms and in the subject-matters with which they deal. The tendency of modern legislation has discouraged the granting of special powers by local Acts, and has rather taken the direction of enabling local authorities to adopt clauses which are of general application, or to legislate for their own requirements by means of by-laws. Nuisances affecting particular localities can now be, and often are, dealt with summarily in this way. Thus obstructions to highways may be summarily dealt with under the Highway Acts, *e.g.* 5 & 6 Will. iv. c. 50, Act of 1835, ss. 26, 56, 72, 77, 78, etc.

Further powers are given to local authorities in towns for regulating physical obstructions in or near streets, by secs. 66–83 of the Towns Improvement Clauses Act, 1847, 10 & 11 Vict. c. 34; and for dealing with

obstructions to traffic, by secs. 21–29 of the Towns Police Clauses Act of the same year, 10 & 11 Vict. c. 89. These sections are now in force in all urban districts by virtue of secs. 160 and 171 of the Public Health Act, 1875 (see also the Metropolis Management Act, 1855, 18 & 19 Vict. c. 120, and the Act of 1862, 25 & 26 Vict. c. 102). Vehicles likely from their size or weight to damage roads or interfere with other traffic may only be used subject to conditions for minimising the nuisance they would otherwise occasion (see the Highways and Locomotives Acts, 1861, 1865, 1878, and 1896).

So also there are now statutory requirements that mines and quarries near highways must be properly fenced so as to prevent persons or straying animals from falling into them and being injured. And local authorities have summary powers of enforcing the observance of these provisions (35 & 36 Vict. c. 77, s. 13; 50 & 51 Vict. c. 19, s. 3, and c. 58, s. 37). Barbed wire fencing adjoining a highway may be similarly dealt with, if a nuisance (56 & 57 Vict. c. 32, s. 3).

The most important enactments authorising summary proceedings are contained in the Public Health Acts and the statutes incorporated with them, and deal with the suppression of nuisances which interfere with the health or convenience of the public generally. The Public Health Act, 1875, following the earlier Nuisances Removal Acts, gives in sec. 91 a list of various matters which shall be deemed to be nuisances which may be dealt with summarily under the provisions of that Act. They may be divided into—(a) things which are a nuisance in ordinary parlance, or are injurious to health; and (b) fireplaces or chimneys causing excessive quantities of smoke. For the purpose of detecting the existence of such nuisances, every local authority shall from time to time cause inspection of their districts to be made (s. 92); and, if satisfied of the existence of a nuisance, shall serve on the person by whose act, default, or sufferance the nuisance arises or continues, or on the owner or occupier of the premises where it arises, a notice requiring its abatement (s. 94). If the notice is not complied with, proceedings may be taken before a Court of summary jurisdiction, who may order the nuisance to be abated and the execution of any works necessary for that purpose (s. 96). The local authority are the proper body to determine what works are necessary; and the Court should order them, if satisfied that they are proper (*R. v. Wheatley*, 1885, 16 Q. B. D. 34; *Clerkenwell Vestry v. Feary*, 1890, 24 Q. B. D. 703). Besides the local authority, any person aggrieved by a nuisance, or any inhabitant of or owner of property in the district, may institute these summary proceedings (s. 105).

Among the nuisances which may be thus dealt with are many of those caused by smoke; but the conditions to which they are subject are peculiar, and they are dealt with in a separate article SMOKE.

The powers so given can only be used for dealing with such nuisances as are specified in sec. 91 or have been added by subsequent legislation. Justices, for instance, cannot summarily order the cessation of a nuisance caused by the use of sewage works constructed under proper sanction, but parties aggrieved are in such a case left to their ordinary remedy, by indictment, information, or action (*R. v. Parlbly*, 1889, 22 Q. B. D. 520).

Inspector of Nuisances.—Every sanitary authority, urban or rural, is required to appoint an inspector or inspectors of nuisances. The same person may also act as their surveyor. His duties are defined by a general order of the Local Government Board, published in the *London Gazette*, 24th March 1891. They include inspecting shops in which unsound food

may be exposed for sale, taking samples of articles suspected of being adulterated, giving notice of cases of infectious disease, calling attention to the existence of all nuisances injurious to health, and superintending the execution of any remedial works that may be directed. The medical officer of health has also all the powers of an inspector of nuisances.

By-Laws.—Local authorities may further make by-laws under sec. 44 for preventing nuisances arising from rubbish, etc., and from keeping animals so as to be injurious to health; for diminishing the noxious effects of offensive trades (s. 113); for the management of slaughter-houses (s. 169); with reference to drainage and sanitary arrangements of buildings (s. 157); for preventing the spread of infectious disease (ss. 90 and 121); for promoting the habitable condition of tents, vans, etc., used for human habitation (48 & 49 Vict. c. 72, s. 9); for the decent conduct of public conveniences (53 & 54 Vict. c. 59, s. 20); for regulating shows which may be dangerous (*ibid.*, s. 38); and for other matters. Such by-laws are intended to supplement, not to supersede or vary, the law. But if made in conformity with the statute which authorises them, may often be useful.

By-laws may also be made under other statutes, such as the Highway Acts.

Under sec. 23 of the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, re-enacting sec. 90 of the original Act of 1835, now repealed, the council of a municipal borough are empowered to make by-laws, amongst other matters, for the prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the borough. The powers so given were among those conferred on County Councils by the Local Government Act, 1888, 51 & 52 Vict. c. 41, s. 16. Where, therefore, in any borough or county it is thought that acts causing a nuisance should be dealt with summarily, power to do so can be obtained without the necessity of applying to Parliament for special sanction.

[*Authorities.*—Clerk and Lindsell on the *Law of Torts*, 2nd ed., 1896; Garrett on the *Law of Nuisances*, 2nd ed., 1897.]

Nulla bona.—This is one of the ordinary forms of return available to a sheriff. It is made either where there is no property of a debtor within the sheriff's bailiwick, or where the proceeds of the sale have not been sufficient to cover the expenses of the execution, or to pay rent which may be exactable by the debtor's landlord, or to meet the amounts of prior writs (see *Dennis v. Whetham*, 1874, L. R. 9 Q. B. 345; *Heenan v. Evans*, 1841, 3 Man. & G. 398; *Wintle v. Freeman*, 1840, 11 Ad. & E. 539). Such a return implies that there are no goods applicable to the plaintiff's writ (*Shattock v. Carden*, 1851, 21 L. J. Ex. 200), and in form, therefore, ought to negative the existence of any property of the debtor within the bailiwick (*Cleaver v. Fisher*, 1842, 2 Dowl. N. S. 292). So a return was held bad which stated that the debtor's premises were so barricaded that it was impossible to ascertain whether there was property therein (*Munk v. Cass*, 1841, 9 Dowl. P. C. 332); as also was one which gave the bankruptcy of the debtor as an excuse for not making the levy (*Wright v. Lainson*, 1837, 2 Mee. & W. 739). If, therefore, the sheriff has notice of some obstacle, he must not on that account remit his seizure; and if in consequence of such notice he returns *nulla bona*, he will be liable for a false return (*Warmoll v. Young*, 1826, 5 Barn. & Cress. 660; cp. *Christopherson v. Burton*, 1848, 3 Ex. Rep. 160; *Cleghorn v. Des Anges*, 1818, 3 Moore, 83). But a sheriff will not be liable for not seizing goods of the presence of which within his bailiwick

he has no notice, if he uses due diligence (*Yourrell v. Proby*, 1868, 2 Ir. C. L. 460); and so long as he makes the only return possible at the time, he will be protected though something subsequently happens to falsify it (*Smallcombe v. Olivier*, 1844, 13 Mee. & W. 77). Where he has rendered himself liable, the measure of damages will be the value of the goods he might have seized (*Dennis v. Whetham*, *supra*).

Where there have been goods of the debtor within the jurisdiction, but the proceeds have gone to pay rent due at the time of the seizure, that need not be stated in the return (*Reynolds v. Barford*, 1844, 7 Man. & G. 449); and he may return *nulla bona* even when there is property, if the writ has been delivered to him to defeat the debtor's creditors (*Shattock v. Carden*, *supra*). On the other hand, if a seizure and sale have actually taken place, a return of *nulla bona* would be bad, even though the sheriff had in his possession an earlier writ for an amount large enough to exhaust the proceeds (*Rybot v. Peckham*, 1778, 1 T. R. 731 *n*); and all a plaintiff has, in such a case, to prove in an action against the sheriff, is that goods were seized, and yet a return of *nulla bona* was made (*Stubbs v. Lainson*, 1836, 1 Mee. & W. 728). So, where there are prior writs, the sheriff ought, before returning *nulla bona*, to ascertain whether they are *bond fide* or not; for if they prove fraudulent, he may be liable as for a false return (*Dennis v. Whetham*, *supra*).

Under a writ of *fi. fa. de bonis testatoris*, the sheriff may, if he find no assets, return *nulla bona* instead of *devastavit* (Williams on *Executors*, 8th ed., 1994, 1995). Should *nulla bona* be returned in the case of a beneficed clergyman, a writ of *levari facias* may be issued to the bishop of the diocese (3 Black. Com. 418; 2 Co. Inst. 4).

In the case of an abortive execution, the costs thereof cannot be added to the judgment debt so as to enable a creditor to petition under the Bankruptcy Act, 1883, s. 6 (*In re Long*, 1888, 20 Q. B. D. 316); nor can they be recovered under a subsequent writ (*Salisbury v. Ray*, 1860, 29 L. J. C. P. 225); but if the sheriff's officer have made an overcharge by mistake, he will be relieved from the penalty imposed by the Sheriffs Act, 1887, s. 29 (*Lee v. Dangar & Co.*, [1892] 1 Q. B. 231; 2 Q. B. 337).

Null and Void.—Properly speaking, a thing is null which does not exist or is not in the nature of things, but figuratively the term is applied to what has no more effect than if it did not exist. When, therefore, in law anything is declared null and void, it will not have the legal consequences which otherwise might be attached to it. At the same time, the presumption is always in favour of the validity of a legal act until the contrary is established, and there are nullities which can be waived (*Maltby v. Murrells*, 1860, 29 L. J. Ex. 377); and so, when transactions are declared by the law, or in statutes or instruments, to be "null and void," they will not, as a rule, be avoided more than the purpose of the law or statute or instrument requires, or on merely immaterial technical grounds (per Turner, L.J., in *Jortin v. South-Eastern Rwy. Co.*, 1855, 6 De G., M. & G. 275; see also *In re Sims*, *Ex parte Sheffield*, 1897, 45 W. R. 189; *Universal Stock Exchange v. Strachan*, [1896] App. Cas. 166; *Ernest v. Loma Gold Mines Co.*, [1896] 2 Ch. 572; *Miller v. Everton*, 1895, 64 L. J. Q. B. 692; *In re Toomer*, *Ex parte Blaißberg*, 1883, L. R. 23 Ch. D. 254; *Maleverer v. Redshaw*, 1669, 1 Mod. 35). As to the effect of statutes, Twisdén, J., said (*Maleverer v. Redshaw*, *supra*): "The statute is like a tyrant: where he comes he makes all void; but the common law

is like a nursing father: makes void only that part where the fault is, and preserves the rest." And even instruments void on the ground of forgery may give rise to obligations which will be enforced in law, provided the party relying upon them has not himself been guilty of uttering them, or of laches, or of express acquiescence (*Ogilvie v. West Australian Mortgage and Agency Corporation*, [1896] App. Cas. 257; *Clutton v. Attenborough*, [1895] 2 Q. B. 707; *Bank of England v. Vagliano*, [1891] App. Cas. 107). This will be especially so if the subsequent acts have taken place *bonâ fide*, in the ordinary course of business and under such circumstances that the parties cannot be fully reinstated in their former position (*London and River Plate Bank v. Bank of Liverpool*, [1896] 1 Q. B. 7). Acts done apparently within the scope of an agent's authority will *primâ facie* be deemed valid (*Biggerstaff v. Rowatt's Wharf*, [1896] 2 Ch. 93); and even when acts are avoided on the score of being *ultra vires*, yet restitution may be allowed to non-consenting parties (*Andrews v. Gas Meter Co.*, 1896, 45 W. R. 46; *Ashbury v. Watson*, 1885, 30 Ch. D. 376; *Hutton v. Scarborough Cliff Hotel Co.*, 1865, 2 Drew. & Sm. 521). If a transaction is only partly bad, then, if the void can be separated from the good, it will only be annulled so far as the former is concerned (*Dubowski v. Goldstein*, [1896] 1 Q. B. 478; *In re Burdett*, 1888, L. R. 20 Q. B. D. 310; *Maleverer v. Redshaw*, *supra*); but if, on the other hand, the legal and illegal parts are inseparable, the whole must fall (Willes, J., in *Pickering v. Ilfracombe Rwy. Co.*, 1868, L. R. 3 C. P. 235, 250). Even where the instrument is bad *in toto*, personal covenants therein may nevertheless be enforceable (*Payne v. Mayor, etc., of Brecon*, 1858, 27 L. J. Ex. 495; *Kerrison v. Cole*, 1807, 8 East, 231; *Mouys v. Leake and Jones*, 1799, 8 T. R. 411). And an instrument, though bad in substance, through infringing the law in some way, may yet avail as between the parties to it (*Cookson v. Swire*, 1885, 54 L. J. Q. B. 249; *Doe d. Roberts v. Roberts*, 1819, 2 Barn. & Ald. 367, 20 R. R. 477).

Important consequences follow from the fact that where a legal act is liable to be avoided, someone must move to set it aside; and until someone does so move, it can only be treated as voidable. So in some cases a party may be barred from objecting through acquiescence, as by taking some benefit under the instrument in question (*Strachan v. Universal Stock Exchange*, [1895] 2 Q. B. 697; *Davenport v. R.*, 1877, 3 App. Cas. 115; *Doe d. Bryan v. Bancks*, 1821, 4 Barn. & Ald. 401, 23 R. R. 318; *Hyde v. Watts*, 1843, 12 Mee. & W. 254). But it is not necessary that the transaction should be repudiated immediately on the discovery of its voidable nature, and a reasonable time for consideration will be allowed (*Aaron's Reefs Ltd. v. Twiss*, [1896] App. Cas. 273; *Imperial Ottoman Bank v. Trustees, Executors, and Securities Insurance Corporation*, 1895, 13 R. 287). Sometimes, too, a formal act must be performed before the forfeiture can be complete, and therefore the bargain can only be treated as voidable after such formal act has been done (*Arnsby v. Woodward*, 1827, 6 Barn. & Cress. 519). As against the same person, if an act is void for him in one character, it will usually be so for him in another (*Betham v. Gregg*, 1834, 10 Bing. 352). And the Statute of Limitations will only run against a contract from the date of its avoidance (*Cowper v. Godmond*, 1833, 9 Bing. 748).

Again, on the principles that no one can take advantage of his own fraud and *quod non decipitur qui scit se decipi*, the grantor of a void instrument and his representatives will be estopped from pleading its nullity

(*Davis v. Goodman*, 1880, L. R. 5 C. P. D. 128; *Pennington v. Cardale*, 1858, 27 L. J. Ex. 438; *Phillpotts v. Phillpotts*, 1850, 20 L. J. C. P. 11; *Doe d. Roberts v. Roberts*, *supra*; *Bessey v. Windham*, 1844, 6 Q. B. R. 166; *Malins v. Freeman*, 1838, 4 Bing. N. C. 395; *Davis v. Bryan*, 1827, 6 Barn. & Cress. 651, 30 R. R. 491; *Hunt v. Singleton*, 1597, *cit.* 4 Bing. N. C. p. 398; *Sale v. Bishop of Coventry*, 1589, 3 Co. R. 59 b). But a voiding statute may be so strongly worded as even to avail the grantor (*Sims v. Trollope*, 1897, [1897] 1 Q. B. 24; *In re Yates*, 1888, L. R. 38 Ch. D. 112; *Davies v. Rees*, 1886, 17 Q. B. D. 408; *Ex parte Parsons*, *In re Townsend*, 1886, 16 Q. B. D. 532; *Davenport v. R.*, *supra*; *R. v. Hipswell*, 1828, 8 Barn. & Cress. 466). This will especially be so if the statute renders the act illegal on public grounds, or to protect persons who cannot protect themselves, and not merely from regard for the interests of the parties (*R. v. Hipswell*, *supra*); and if a penalty is annexed, that will be almost conclusive of the absolute illegality of the act (*Gye v. Felton*, 1813, 4 Taun. 876). An important difference, therefore, exists between what can be construed to be merely irregular, and is in consequence amendable, and what absolutely lacks force and efficacy.

From what has just been stated, it follows that where any act in the law is declared void, but can only be treated as voidable until objection is taken to it, the party not in default alone can move in the matter. The right of election lies with the grantee or other parties except the grantor, such as creditors (*Davenport v. R.*, *supra*; *Hughes v. Palmer*, 1865, 34 L. J. C. P. 279; *Malins v. Freeman*, *supra*; *Roberts v. Davey*, 1833, 4 Barn. & Adol. 664). But sometimes a void instrument may bind even strangers as well as the grantor (*Bessey v. Windham*, *supra*).

No special magic attaches to such words as "utterly" or "to all intents and purposes" annexed to the phrase "null and void" in statutes and the like. Statutes like the 13 Eliz. c. 5, and 27 Eliz. c. 4, directed against fraud, will be favourably interpreted (*Gooch's case*, 1589, 5 Co. Rep. 60 b). When words such as the above, therefore, occur, unless the purpose of the statute is to render the act struck at penal, they will be treated as little more than expletive (*Molton v. Camroux*, 1849, 18 L. J. Ex. 68, 356; *Malins v. Freeman*, *supra*; *R. v. Hipswell*, *supra*; *Hunt v. Singleton*, *supra*; *Sale v. Bishop of Coventry*, *supra*). And that a statute is to be construed as penal ought to be strictly established (*Davenport v. R.*, *supra*). In this connection, the wording of the statute will frequently help, as where it declares an act to be void "in respect of" certain kinds of property, or "as against" certain persons (*Edison General Electric Co. v. Westminster and Vancouver Tramway Co.*, [1897] App. Cas. 193; *Davies v. Rees*, *supra*; *In re Toomer*, *Ex parte Blaiberg*, *supra*). If once, however, a transaction or class of transactions has been declared illegal and void by statute, it will not again become valid on the repeal of such statute, apart from express provision to that effect (*Gwynne v. Drewitt*, [1894] 2 Ch. 616; *cp. Interpretation Act*, 1889, 52 & 53 Vict. c. 63, ss. 11 (1), 38 (2)).

Nullity of Marriage.—There are two classes of cases in which marriages are, or may be, declared null and void: marriages which are void *ab initio*, and marriages which are only voidable at the suit of one of the contracting parties. The former class may itself be subdivided into two heads, namely, the case of marriages which are, *ex necessitate rei*, no marriages at all; and marriages which are only rendered absolutely null and void by statute. To put the most extreme case, a ceremony of marriage

performed between two persons of the same sex would, by the law of nature, and by all laws human and divine, be nothing but a mockery and absolute nullity. Again, in all Christian countries—in all countries where monogamy is recognised as the fundamental principle of marriage—a ceremony or form of marriage, gone through by a person already united to another living person in lawful wedlock, cannot by any possibility be of any binding force or validity, assuming, of course, that proof of the validity of the former marriage and of the survival of both parties at the date of the bigamous marriage, be available (see *In re Wilson's Trusts*, 1866, L. R. 1 Eq. 247). In Scotland, however, the children of such putative marriages, if the same be contracted in good faith and without previous knowledge of the impediment, are recognised as legitimate.

It is to be remarked, as a matter of general observation, that, in suits for nullity, all legal presumptions are in favour of the validity, and against the nullity, of the marriage (see *Catterall v. Sweetman*, 1845, 1 Rob. Eccl. 304).

In suits for nullity on the ground of bigamy, lapse of time, however protracted, and misconduct, however gross, on the part of the petitioner, are not grounds of defence. If either of the parties to this or any other form of void marriage invoke the jurisdiction of the Court in order to obtain a formal decree declaring the *de facto* marriage null and void, for additional security or protection, the Court has no discretion to withhold such decree, even where both parties were, at the time they went through the ceremony of marriage, fully cognisant that it was absolutely void (*Andrews* (falsely called *Ross*) v. *Ross*, 1890, 15 P. D. 15; 59 L. T. 900; following *Miles v. Chilton*, 1349, 6 N. C. 636; 1 Rob. 684), pursuant to the mode of procedure laid down for the guidance of the Court, in suits for nullity of marriage, by the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 22.

A marriage is said to be void when it is good for no legal purpose, and its invalidity may be maintained in any proceeding, in any Court, between any parties, whether in the lifetime or after the death of the supposed husband and wife, and whether the question arises directly or collaterally (*Shelford, Mar. and Div.* 479, 480).

A voidable marriage is one which, as the word implies, requires some proceeding to set it aside; and, until set aside by decree of a lawfully constituted authority, it is a good marriage. Proceedings to set it aside can only be taken during the lifetime of the parties themselves: after the death of either of the parties, the validity of the marriage is beyond question.

The distinction between void and voidable marriages is so forcibly pointed out in the leading case of *Elliott v. Gurr*, 1812, 2 Phillim. 16, that the language there used has been adopted by all the leading text-writers on the subject. The marriage there in question was within the degrees prohibited by canonical law, for the husband was, by affinity, the wife's nephew, being the sister's son of her former husband; and the case arose out of a question as to the right of administration, after the wife's death. The learned judge of the Prerogative Court of Canterbury (Sir John Nicholl), in giving judgment (pp. 18, 19), said:

... The difference between void and voidable is so clear that no person who ever looked into any elementary book on the subject is ignorant of it. The canonical disabilities, such as consanguinity, affinity, and certain corporal infirmities, only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained; and such marriages are esteemed valid unto all civil purposes, unless such sentence of nullity is actually declared during the lifetime of the parties. Civil disabilities, such as prior marriage, want of age, idiocy, and the like, make the contract

void *ab initio*—not merely voidable: these do not dissolve a contract already made, but they render the parties incapable of contracting at all: they do not put asunder those who are joined together, but they previously hinder the junction; and if any persons under these legal incapacities come together, it is a meretricious, and not a matrimonial, union; and therefore no sentence of avoidance is necessary. The present is not a void, but a voidable, marriage; and therefore, not having been declared void in the lifetime of the parties, is valid to all civil purposes; and to all such purposes the deceased died the wife of William Gurr, and he was her husband, and their issue are legitimate. . . .

So, too, in *Bonham v. Badgley*, 1845, 7 Illinois Reps. (or 2 Gilman), 622, where a man had married his sister's daughter (his own niece), the Court said that the marriage could not be impeached after the death of one of the parties.

The question of marriages within the PROHIBITED DEGREES of relationship covers a wide field, and has given rise to much controversy. Although it is very commonly assumed that the table set forth in Churches and in the Book of Common Prayer is to be taken in its entirety as binding in law, it may be doubted whether this is so absolutely clear. But see AFFINITY.

The Statute 28 Hen. VIII. c. 7, which included a table of prohibited degrees, has been repealed, and by 32 Hen. VIII. c. 38, s. 2, the foundation of our statute laws of marriage, "lawful persons" are declared to be "those that be not prohibited by God's law to marry"; and the latter part of the section enacts that "no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees" (see judgment of Sir Cresswell Cresswell in *Wing v. Taylor*, 1861, 2 Sw. & Tr. 297). These degrees are to be found in the 18th chapter of the Book of Leviticus, and a reference thereto will show that they are very limited in number.

The Act 32 Hen. VIII. c. 38 gave to the temporal Courts no power to interfere with the spiritual tribunals in respect of marriages *within* the Levitical degrees, for it is silent as to whether persons might, or might not, marry *within* any of those degrees; but, in regard to some, it is obvious that marriage would be repugnant to the law of nature, *i.e.* marriages in the direct lineal line of consanguinity and those between brothers and sisters (see Bishop, *Mar. and Div.* vol. i. s. 118, citing the Massachusetts case of *Sutton v. Warren*, 10 Met. 451). (As to the "law of nature," see further the remarks of Chancellor Kent in *Wightman v. Wightman*, 1820, 4 John, New York Chan. Reps. 343.)

But, on the other hand, in determining what persons are prohibited by the Levitical law to intermarry, it was pointed out in *Butler v. Gastrill*, 1722, Gilb. Ch. 156, 158, that not merely the words of the law itself are to be taken into consideration, but that what, by a just and fair interpretation, may be adduced from that law, ought also to be considered.

When we come to the Act of the present century, around which so much controversy still rages, we find no explicit definition or explanation of the term "prohibited degrees." This statute, known as Lord Lyndhurst's Act (5 & 6 Will. IV. c. 54), which, it should be noted, does not extend to Scotland, after providing that marriages, solemnised before the passing of the Act (31st Aug. 1835), of persons within the prohibited degrees of AFFINITY (as distinct from CONSANGUINITY) were not to be annulled, enacted (s. 2) that all marriages thereafter celebrated "between persons within the prohibited degrees of consanguinity or affinity" should be "absolutely null and void to all intents and purposes whatsoever" (see as to the extent of the effect of the last half-dozen words, *In re Goodman's Trusts*, 1881, 17 Ch. D. 266). To ascertain what "the prohibited degrees" are, we are left to grope among the statutes of Hen. VIII., and are then, as we have seen, thrown back upon the old

Mosaical law, as laid down for the guidance of our forefathers in the 18th chapter of Leviticus.

In a case heard by Sir Francis Jeune on 12th July 1891, the petitioner, a niece of the respondent's former wife, was married in England, under a dispensation from the Pope, and a decree of nullity of marriage was pronounced; but this may well have been upon the ground that, by ecclesiastical law, the marriage was voidable because its validity was called in question by one of the parties during the lifetime of the other (*Prentice* (otherwise *Medina*) v. *Medina*, unreported).

A marriage is equally void though one of the parties is illegitimate (*R. v. Inhabitants of St. Giles*, 1840, 11 Ad. & E. N. S. 173; *R. v. Brighton*, 1861, 1 B. & S. 447), or the consanguinity or affinity be constituted through the half blood (*Mette v. Mette*, 1859, 1 Sw. & Tr. 416); but the Statute 28 Hen. VIII. c. 7, being repealed, mere cohabitation, before marriage, with a relative of the other party to the marriage will not constitute affinity; to constitute affinity there must have been an actual and valid marriage with the relative (*Wing v. Taylor*, 1861, 2 Sw. & Tr. 278).

If two domiciled English subjects, related or connected within the prohibited degrees, contract a marriage in a country where such marriages are, by the law of the foreign country, recognised as lawful, the marriage will nevertheless be invalid in the place of their domicile, that is, in England (*Brook v. Brook*, 1861, 9 H. L. 193). But if two persons, having *bonâ fide* abandoned their English domicile of origin and acquired a domicile of choice in a foreign country or British colony where such marriages are lawful, contract a marriage in such foreign country or British colony, and, at some later period of their lives, *bonâ fide* resume their English domicile, their marriage would be recognised as lawful in this country. In the case cited, the parties appear to have gone abroad with the object of getting married and endeavouring to evade the law of the country of their actual domicile.

The jurisdiction of the Ecclesiastical Courts in suits of nullity of marriage was transferred to the Court for Divorce and Matrimonial Causes (now the Probate, Divorce, and Admiralty Division of the High Court of Justice in England) by the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 6. As to the numerous decided cases on nullity, dependent on questions of domicile and jurisdiction, see DOMICILE; FOREIGN DIVORCE; FOREIGN MARRIAGE. It may, however, be worthy of note that, whereas the most recent and most important judgment of the Privy Council in *Le Mesurier v. Le Mesurier* ([1895] App. Cas. 517; 64 L. J. P. C. 97; 72 L. T. 873; 11 W. R. 527) overruled practically, if not technically, the decision of the majority of the Court of Appeal in *Niboyet v. Niboyet* (39 L. T. 486; 4 P. D. 1), which had established, in a case of divorce, the principle of a "matrimonial home," as distinguished from "domicile" (see vol. v. at p. 416), it does not, in terms, mention nullity of marriage. The passage of the judgment of the Privy Council to which we particularly desire to draw attention, is as follows:—

The main reason assigned for their decision by the . . . majority was that, before the Act of 1857 became law, the petitioner (Madame Niboyet) would have been entitled to sue her husband in the Bishop's Court, although he was not domiciled in England, and to ask either for restitution of conjugal rights, or for a divorce *à mensâ et thoro* (equivalent to the present judicial separation), and, in either case, for proper alimony; and consequently that, after the Act of 1857 passed, jurisdiction in divorce might be exercised in the same circumstances. There appears to their lordships to be an obvious fallacy in that reasoning. It is not doubtful that there may be residence, without domicile, sufficient to sustain a suit for restitution of conjugal rights, for

separation, or for aliment; but it does not follow that such residence must also give jurisdiction to dissolve the marriage.

It would seem, therefore, that—paraphrasing the language of the Privy Council and applying it to nullity of marriage, which finds no mention, one way or the other, in the passage quoted—it does not follow that such residence—matrimonial residence, that is, short of domicile—must also give jurisdiction to annul the marriage. The passage of the judgment concludes thus: “Their lordships cannot construe sec. 27 of the Act of 1857 as giving the English Court jurisdiction in all cases where *any other* matrimonial suit would previously have been entertained by the Bishop’s Court.” Whether the words we have italicised were intended to include nullity of marriage, or only those other suits mentioned in the passage, is an open question. The judgment of the Privy Council not being binding upon the Court of Appeal, *Niboyet v. Niboyet* is not technically overruled; though, for all practical purposes, it can no longer be relied upon in support of the “matrimonial home” theory in suits for divorce.

To render a marriage legal, according to English law, whether solemnised in England or in any other part of the world, it is necessary that it should be entered into by single persons (which, of course, includes widowers, widows, and legally divorced persons—excepting from consideration, for the present purpose, any question as to the validity of divorces or the remarriage of *divorcees* in the eye of ecclesiastical law), not being within the prohibited degrees of consanguinity or affinity, both of whom are of consenting and sound mind (as to insanity in relation to marriage, see article LUNACY, vol. viii. at p. 49), and able to perform the duties of matrimony (Browne and Powles on *Divorce*, 6th ed. (1897) 171; and see also Dicey on *Domicile*, ed. 1879, p. 15). Consent being, therefore, one of the necessary ingredients to the contracting of a valid marriage, on the principle that, according to the laws of this country, *consensus non concubitus facit matrimonium*, instances occur, now and again, of petitions for nullity on the ground of want of consent, or duress: *Miss Turner’s case*, H. L. Jour. 1827, 308; *Wakefield’s case*, 69 Ann. Register, 316; *Scott v. Sebright*, 1886, 12 P. D. 21; 57 L. T. 421; 56 L. J. 11 P. & M.; *Crane* (otherwise *Cooper*) v. *Crane*, [1891] Prob. 369; 61 L. J. 35 P. & M.; 40 W. R. 127; *Clark* (falsely called *Stier*) v. *Stier*, [1896] Prob. 1; 73 L. T. 632; 65 L. J. 13 P. & M.; 11 R. 668; *Bartlett* (falsely called *Rice*) v. *Rice*, [1895] 72 L. T. 122; or on the ground of fraud: *Portsmouth v. Portsmouth*, 1828, 1 Hag. Ec. 355; *Moss v. Moss* (otherwise *Archer*), [1897] Prob. 263; 66 L. J. 154 P. & M.; 77 L. T. 220. The last is the most recent case, and the judgment of the president (Sir F. H. Jeune) contains an elaborate review of the law on this subject.

Decrees of nullity on the ground of undue publication of banns are extremely rare; and for the law on this branch of the subject, as well as for a detailed exposition of the law and practice in regard to nullity of marriage, the reader is referred to the standard text-books, amongst the foremost of which we may mention Browne and Powles’ *Law of Divorce*, 6th ed. (1897); Bishop on the *Law of Marriage and Divorce*; and Eversley, *Law of Domestic Relations*, 2nd ed. (1896).

Impotence—as distinct from mere sterility—is one of the grounds upon which a *de facto* marriage may be annulled. A man is not allowed, however, to plead his own natural impotence as a ground for asking that his *de facto* marriage may be annulled (*Norton v. Seton*, 1819, 3 Phillim. 147). Moreover, the suit must be brought in the lifetime of both parties, and the

validity of a marriage cannot be impeached, on the ground of impotence, after the death of one of them (*A. v. B. and Another*, 1868, L. R. 1 P. & D. 559). In that case, Sir J. P. Wilde held that the next-of-kin of a married woman were not at liberty to question her husband's right to administer her estate, on the alleged ground that the marriage was a nullity by reason of the impotence of the husband. Similarly, it is not open to third persons to institute such a suit, though both the parties be still alive. The old rule which prevailed in the Ecclesiastical Courts, requiring triennial cohabitation prior to the institution of a suit for nullity on the ground of impotence, need no longer be considered, for, so far as it was at any time recognised and acted upon in the Ecclesiastical Courts of this country, it was abrogated in 1871, when Lord Penzance decided that a decree should be pronounced in a case where the parties to a *de facto* marriage had cohabited for a period slightly short of three years, the man's capacity and desire to consummate the marriage being unquestioned, and the *bona fides* of the suit, and the practical impossibility of consummating the marriage in consequence of the condition of the woman, although there was no structural defect, being proved to the satisfaction of the Court (*G. v. G.*; 1871, L. R. 2 P. & D. 287). The first matter the Court looks to is as to the *bona fides* of the case: once satisfied as to that, no special period of cohabitation is now required. The ground for the interference of the Court, in cases of impotence, is the practical impossibility of consummating the marriage. Whether the theory of impotence *quoad hanc*—impotence, that is, on the part of a particular man in regard to a particular woman—is founded on physiological fact, we have not here space to discuss; but we believe that, in regard to certain animals, physiologists are said to have noted instances of this nature. Conversely, in the case of a woman, though well-formed and capable of sexual intercourse, there are authorities which show such repugnance to intercourse with a particular man as to amount to a practical impossibility of consummation. Perhaps the strongest instance, and certainly one of the most recent, is to be found in the case of *F. v. P.* (falsely called *F.*), 1896, 75 L. T. 192. In that case, the petitioner was, at the time of the marriage in question, a widower with children, and the respondent was a widow, but without children. Upon medical inspection, the petitioner was found virile, and the respondent exhibited no structural impediment nor signs of virginity. The period of cohabitation was less than six months, during which time the petitioner used every means, short of brute force, to consummate the marriage while sleeping with the respondent, but she habitually wrapped her night-clothes and the bedding around her, and absolutely refused to allow sexual intercourse. The president (Sir Francis Jeune), being satisfied that intercourse had not taken place, drew the inference from the facts, that the respondent's refusal to allow the marriage to be consummated arose from some latent incapacity on her part, and pronounced a decree of nullity.

Other cases and points will be found mentioned in Browne and Powles on *Divorce*, 6th ed.; and Eversley's *Law of Domestic Relations*, 2nd ed.; and see MEDICAL JURISPRUDENCE, vol. viii. at p. 335.

Nullius filius.—See BASTARD.

Nullum tempus aut locus occurrit regi.—If the king, says Lord Coke, hath a villein who purchases land and alien it before

the king enter, yet the king may enter into whose hands soever the land shall come; or if the villein buyeth goods and sell them before that the king seizeth them, yet the king may seize these goods in whose hands soever they be; because no time or place affects the king (see *Co. Litt.* 119 a; 2 *Inst.* 273). The rule is based upon the principle that the sovereign can do no wrong, and therefore laches or negligence cannot be pleaded against him. Wherefore, *primâ facie*, civil claims by the Crown receive no prejudice by lapse of time, and criminal prosecutions for felonies and misdemeanours, which are always instituted in the sovereign's name, can be commenced at any time after the offence. Thus, if a bill of exchange has been seized under an extent before it has become due, and the Crown's officer have neglected to duly present it or notify its dishonour, nevertheless the drawer or indorsers will not be discharged.

Of necessity, however, various exceptions to the rule have been recognised both at common law and by statute. And, first, a good title may be made by a subject to treasure trove, waifs, estrays, and other things which may be seized without matter of record by prescription even against the king. Secondly, if the subject's right has determined before the sovereign claims, the latter must fail for want of exertion in due time, as, for example, where land belonging to a tenant for life has been forfeited, but he dies before the forfeiture is enforced; a result which must also happen when the subject's right is limited in point of time, as, for example, when the sovereign succeeds to the right to a *next* presentation, but does not exercise it, and the patron's clerk dies incumbent, or is canonically deprived, the Crown will not be allowed to claim a second or other subsequent one in lieu thereof. Thirdly, the right of the Crown must sometimes be established by legal proceedings before it can be fully exercised, as, for example, under the 13 Rich. II. st. 1, c. 1. And, fourthly, by various statutes the title of the Crown will be defeated unless exerted within a specified number of years. Thus the 21 James I. c. 2 (repealed S. L. R. 1863) allowed sixty years' possession prior to 19th February 1623, the beginning of the then session of Parliament, of manors, etc., to disable the sovereign from claiming them, an Act which was followed by the 9 Geo. III. c. 16, which fixed a like period prior to the commencement of the suit for recovery of the estate, this last Act being in turn amended by the 24 & 25 Vict. c. 62 (see *A.-G. for British Honduras v. Bristowe*, 1880, L. R. 6 App. Cas. 143). But the acts relied on as showing adverse possession must be acts of ownership and not of trespass not acquiesced in by the Crown (*Doe d. William IV. v. Roberts*, 1844, 13 Mee. & W. 520), though, if the Crown have dedicated a road to the public, it will be bound by long acquiescence in the public user of it (*R. v. East Mark*, 1848, 11 Q. B. 877, 882).

Other statutes in this connection are the 31 Eliz. c. 5, which enacts that indictments or informations upon any statute penal whereby the forfeiture is limited to the sovereign must, unless such statute otherwise provides, be brought within two years, and that the same, when the forfeiture is limited to the sovereign and prosecutor, must be brought within one year (but see 11 & 12 Vict. c. 43, s. 36); the 21 James I. c. 14, which contains special directions as to informations of intrusion when the Crown has been out of possession for twenty years; the 7 & 8 Will. III. c. 3, sec. 5 of which enacts that indictments for treason (other than attempts to assassinate the sovereign) must be prosecuted within three years of the act of treason being committed; the 32 Geo. III. c. 58 (repealed S. L. R. 1887), which barred the Crown in informations for usurping corporate offices or franchises after a lapse of six years; the 60 Geo. III. and 1 Geo. IV.

c. 1, sec. 7 of which requires prosecutions for training to arms and illegal drilling to be instituted within six months; the 9 Geo. iv. c. 69, sec. 4 of which compels night poaching offences to be prosecuted within twelve months; the 7 Will. iv. and 1 Vict. c. 78 (repealed by 45 & 46 Vict. c. 50, s. 5), sec. 23 of which enacted that applications for *Quo warranto* under the Act had to be made within one year from the election or disqualification of the official; the 23 & 24 Vict. c. 53, amended by 24 & 25 Vict. c. 62, s. 2, as to suits arising within the Duchy of Cornwall; the 39 & 40 Vict. c. 36, sec. 257 of which requires offences against the customs to be prosecuted within three years (cp. 16 & 17 Vict. c. 107, s. 303; *Queen v. Thompson*, 1851, 20 L. J. M. C. 183); the 46 & 47 Vict. c. 51, s. 51, and 47 & 48 Vict. c. 70, s. 30, which require corrupt or illegal practices at elections to be prosecuted within one year; the 48 & 49 Vict. c. 69, sec. 5 of which requires prosecutions for carnally knowing girls between the ages of thirteen and sixteen, or attempting the same, to be brought within three months; and the 56 & 57 Vict. c. 61, sec. 1 of which enacts that prosecutions for acts done in execution or intended execution of any Act of Parliament, or of any public duty or authority, or for neglect or default in the execution of such act or duty, must be brought within six months.

Nuncio (*Nuntius apostolicus*).—A diplomatic representative accredited by the Pope to certain Roman Catholic States (see LEGATE). The office was created after the Reformation, for the purpose, more especially, of counter-acting Protestant influence. Between 1581 and 1588 nuncios were appointed in Vienna, Cologne, Lucern, and Brussels. The institution of the *de propaganda fide* congregation at Rome invested the nuncios with more extensive duties and power. At the present day the nuncio, though his legal character under the Italian law of guarantees is that of a diplomatic agent solely, and as such, in Vienna, Paris, Madrid, Lisbon, Brussels, and Munich, ranks as *doyen* of the diplomatic corps, is still supposed to exercise functions in connection with the propaganda.

An internuncio is a papal minister of the second class, not enjoying, like nuncios, the representative character. Secretaries of legation attached to the Holy See are also called internuncios when filling by deputy the place of a nuncio (see POPE).

Nunc pro tunc.—The Court will in certain cases allow a proceeding to be treated as being taken on a particular date, although as a matter of fact not completed until afterwards. Where this is done the proceeding is said to be taken *nunc pro tunc*.

Thus judgments and orders may be entered *nunc pro tunc*. Upon this subject the judgment of Hall, V.C., in *Turner v. London and South-Western Rwy. Co.*, 1874, L. R. 17 Eq. 561, may be consulted. In that case judgment had been reserved, but between the hearing and delivery of judgment the plaintiff died. The learned judge, after consideration and examination into authorities, came to the conclusion that he was able to deliver judgment, and to direct that the judgment should be entered as of the date when the argument upon the case concluded. This case was followed by North, J., in *Eccroyd v. Coulthard*, [1897] 2 Ch. p. 573.

At law, the practice before the Judicature Acts was that all judgments, whether interlocutory or final, should be entered of record of the day of the month and year, whether in term or vacation, when signed, and should not

have relation to any other day; but it was competent to the Court or a judge to order a judgment to be entered *nunc pro tunc* (*Reg.-Gen.*, H. T. 1853, r. 56). By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 139, the death of either party between the verdict and the judgment could not be alleged for error, so as such judgment was entered within two terms after the verdict. The above section is in the words of the repealed statute 17 Car. II. c. 8, s. 1.

There are very numerous cases on the subject, the result of which is thus stated in a leading authority: "The Court will in general permit a judgment to be entered *nunc pro tunc*, where the signing of it has been delayed by the act of the Court. Therefore, if a party dies after special verdict, or after a special case has been stated for the opinion of the Court, or after a motion for a new trial, or after a point of law set down for argument and pending the time taken for argument, or whilst the Court are considering of their judgment, the Court will allow judgment to be entered up after his death, *nunc pro tunc*, in order that a party may not be prejudiced by a delay arising from an act of the Court. But if the judgment was not entered up by reason of the laches of the plaintiff or those representing him, or by reason of a proceeding in the common course of law, as by an appeal or the like, the Court will not allow the judgment to be so entered up. In fact, they will not grant such leave in any case, except where the party entitled to sign judgment has been prevented from so doing by reason of an unavoidable delay, occasioned by the act of the Court. . . . It may be added that the power of the Court to enter judgment *nunc pro tunc* does not depend upon statute; it is a power at common law, and, by the ancient practice of the Court, to prevent an unjust prejudice to the suitor by the delay unavoidably arising from the act of the Court. The effect of the judgment, when entered, may depend upon statute; but the power to enter it does not" (*Chitty's Arch. Pr.* pp. 1029, 1030, and cases there cited).

In the Court of Chancery, under a general order of the 4th December 1691, all orders, as well on the hearing of any cause as interlocutory rules and process pronounced and made in Michaelmas and Hilary Terms or the vacations following the same terms, were required to be entered before the first day of the ensuing Michaelmas Term; and all orders pronounced and made in Easter and Trinity Terms or the vacations following them were required to be entered before the first day of the ensuing Easter Term (*Sanders' Orders*, p. 394). That order was not included in the Chancery Consolidated Orders, 1859, but its provisions are still acted on; and, where an order has not been entered within the prescribed time, leave to enter it *nunc pro tunc* is still required.

Formerly an order of course was required for the purpose, but now it is no longer necessary to obtain an order to enter a judgment or order *nunc pro tunc*, but in all cases in which such entries were formerly made under orders of course, the solicitor applying to have a judgment or order so entered must leave with the clerk of entries a memorandum in writing countersigned by the Chancery Registrar, and bearing a stamp according to the scale of Court fees for the time being in force (Order 52, r. 15).

Where an original decree was not to be found, but had been acted on by reports and recited in an order on further directions, it was allowed to be drawn up and entered *nunc pro tunc* (*Donne v. Lewis*, 1805, 11 Ves. 601). And where the pleadings and decree were lost, a paper writing dated in 1684 was ordered in 1763 to be entered as the decree, and enrolled *nunc pro tunc* (*Jesson v. Brewer*, 1763, 1 Dick. 370). In *Lawrence v. Richmond*, 1820,

1 Jac. & W. 241, a decree was entered *nunc pro tunc* after a lapse of twenty-three years (see, too, *Russell v. Tapping*, 1855, 3 W. R. 379; *Ex parte Dean and Chapter of St. Paul's*, 1870, 18 W. R. 724). In *In re Jones*, *Bullis v. Jones*, 1891, 39 W. R. 619, an order had been drawn up but never left to be passed and entered. The Court, on an *ex parte* application, allowed it to be redrawn, passed, and entered *nunc pro tunc* after a lapse of six years.

As to entering judgments *nunc pro tunc* after death of a party between hearing and judgment, see *Collinson v. Lister*, 1855, 20 Beav. 355; *Troup v. Troup*, 1868, 16 W. R. 573, cited in the judgment in *Turner v. London and South-Western Rwy. Co.*, 1874, L. R. 17 Eq. 561; and see *Cumber v. Wane*, 1718, 1 Stra. 426; *Davies v. Davies*, 1804, 9 Ves. 461.

Under the present practice, where any judgment is pronounced by the Court or a judge in Court, the entry of the judgment is to be dated as of the day on which such judgment is pronounced, unless the Court or judge otherwise orders, and the judgment takes effect from that date; but by special leave a judgment may be ante-dated or post-dated (Order 41, r. 3).

[*Authorities.*—*The Annual Practice*, 1898; Chitty's *Archbold's Practice*, 14th ed., 1885, pp. 1028–1030; Daniell's *Chancery Practice*, 6th ed., 1882, pp. 810, 811; Day's *Common Law Procedure Acts*, 4th ed., 1871, pp. 157, 435; Sanders' *Chancery Orders*, 1845, p. 394; Seton's *Judgments and Orders*, 5th ed., 1891, p. 166.]

Nuncupative Will.—A nuncupative will is one made without writing, before a sufficient number of witnesses. Lands, tenements, and hereditaments could never be devised by such wills, but only personal estate. By the Statute of Frauds (29 Car. II. c. 3, s. 19) they were placed under great restrictions, and rendered altogether invalid by the Statute of Wills (1 Vict. c. 26) on or after 1st January 1838. But by both statutes exceptions were made, in the same form of words, in favour of soldiers and mariners: “Any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act.” In this particular case nuncupative wills, as well as other informal wills, may therefore still be made by soldiers and sailors. (See MILITARY TESTAMENT; NAVAL TESTAMENT; Black. *Com.* ii. ch. xxxii. p. 500; Williams, *Exors.*, 9th ed., p. 103.)

Nunquam indebitatus.—*Ne unques indebitatus*, or *nunquam indebitatus*, as it was more commonly called, was the form of general issue which was substituted by the Rules of Hilary Term, 1834, for the general issue of *nil debet* which was then in use (see *Reg. Gen.* H. T. 4 Will. IV., and NIL DEBET). It was pleaded to actions of debt on simple contract, other than on bills of exchange and promissory notes, and merely stated that the defendant “never was indebted in manner and form as in the declaration alleged” (3 Chitty on *Pleading*, 7th ed., 169). Subsequently, by Sched. (B. of the C. L. P. Act, 1852, a similar form, stating that the defendant “never was indebted as alleged,” was made applicable to common *indebitatus* counts like those numbered 1 to 14 given in the same schedule; and, by rule 6 of Trinity Term, 1853, it was provided that the plea of *non assumpsit* should be inadmissible to those counts, and that the plea of “never was indebted” should operate as a denial of those matters of fact from which the liability of the defendant arose, *e.g.* in actions for money payable by the defendant to the plaintiff for goods bargained and sold or sold and delivered, the plea

should operate as a denial of the bargain and sale, or sale and delivery in point of fact; and in the action for money payable by the defendant to the plaintiff for money received by the defendant for the use of the plaintiff, it should operate as a denial both of the receipt of the money and of the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff (Bullen and Leake's *Precedents of Pleadings*, 3rd ed., p. 462).

The plea of *nunquam indebitatus* was by rule 7 of Trinity Term, 1853, rendered inadmissible in all actions upon bills of exchange and promissory notes, and on the coming into operation of the Judicature Acts this plea was abolished by Order 21, r. 1, of the R. S. C. 1883, which provides that in actions for a debt or liquidated demand in money comprised in Order 3, r. 6, a mere denial of the debt shall be inadmissible (see Bullen and Leake's *Precedents of Pleadings*, 5th ed., p. 550; *Copley v. Jackson*, 1884, W. N. p. 39).

Oath; Oaths.

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I. GENERAL REMARKS.

Definition.—"This word oath is derived of the Saxon word *Eoth*, and is expressed by these several names, viz.: (1) *Sacramentum*, a *sacra et mente*, because it ought to be performed with a sacred and religious mind; (2) *Juramentum a jure*, which signifieth law and right, because both are required and meant; (3) *Jusjurandum*, compounded of two words, a *jure et jurando*.

"An oath is an affirmation or denial of anything lawful and honest before one or more that have authority to give the same, for advancement of truth and right, calling Almighty God to witness that the testimony is true. . . . So as an oath is so sacred, and so deeply concerneth the consciences of Christian men, as the same cannot be ministered to any unless the same be allowed by the common law, or by some Act of Parliament, neither can any oath allowed by the common law or by Act of Parliament be altered but by Act of Parliament" (3 *Co. Inst.* 165).

"The expressions, 'oath' and 'affidavit' shall in the case of persons for the time being allowed by law to affirm or declare, instead of swearing, include affirmation and declaration, and the expression 'swear' shall in like case include affirm and declare" (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3).

In the Commissioners for Oaths Act, 1889 (52 Vict. c. 10), s. 11, the term "oath" includes affirmation and declaration; "affidavit" includes affirmation, statutory or other declaration, acknowledgment, examination, and attestation or protestation of honour; and "swear" includes affirm, declare, and protest.

Origin.—The practice of supporting a promise by an oath is probably as old as the existence of belief in a God, and it appears to have been utilised from the very earliest times to ratify and ensure the fulfilment of any special contract or undertaking, by importing into the transaction the fear of Divine wrath in case of wilful failure to perform the obligation entered into. The use of the oath to bind the conscience was practised by the Medes and Persians and the ancient Egyptians and Assyrians, as well as by the Greeks and Romans. It has probably prevailed in almost all the religions of the world, both ancient and modern.

The Old Testament contains numerous instances of oaths in support of covenants and promises, the earliest of which occurs in Genesis xxi. 23: "Now swear unto me here by God, that thou wilt not deal falsely with me," etc. And the purgatorial oath or oath of innocence (see *COMPURGATION*), which existed in our criminal law until the fourteenth century, was probably a survival of the custom of the ancient Israelites: "Then shall an oath of the Lord be between them both, that he hath not put his hand unto his neighbour's goods," etc. (Ex. xxii. 11; Num. v. 21). The oath in support of testimony may also probably be traced back to a scriptural source. "When they said, He is not there, he took an oath of the kingdom and nation, that they found thee not" (1 Kings xviii. 10). In these three instances we have examples of the promissory oath, the purgatorial oath, and the oath in support of testimony, the first and last of which are still in constant use, not only in England, but in all European countries except Germany.

Forms of Oath.—There are, broadly speaking, only two forms of oath known in modern legal proceedings. First, the adjuration by invocation of the Deity with uplifted hand, commonly called in this country the Scotch oath; and, secondly, the ordinary form of English oath, which concludes with the words of adjuration, "So help me God," and is sworn upon the Bible or Testament. The oath by invocation of the Deity with uplifted hand is used in the Courts of France, Belgium, and Austria; while the oath on the Bible is used in Spain and Italy, and, for Jews only, in Austria. Oaths have been abolished in Germany. Apart from the comparatively modern innovation of "kissing the Book" (which is peculiar to England), both the forms of oath referred to above are of considerable antiquity, though relatively it would seem that the Scotch form is far more ancient than the English form. There appears, indeed, to be little doubt that the Scotch oath is derived from the original scriptural form of oath, for the sentence "I did swear" in Exodus vi. 8 is alternatively given as "I lifted up my hand" (see Revised Version of the Old Testament, Ex. vi. 8), and the ceremony of taking the oath described in Daniel xii. 7, and Revelations x. 5, 6, "Lifted up his hand to heaven, and sware by Him that liveth for ever and ever," is almost precisely similar to the ordinary Scotch oath, in taking which the witness raises his right hand above his head and repeats the words, "I swear by Almighty God that," etc., or the longer but less con-

venient formula, "I swear by Almighty God, as I shall answer to God at the great day of judgment, that," etc. The shorter form of words has the official sanction of the Council of the Incorporated Law Society as being within the Oaths Act, 1888, s. 5, referred to below. See 37 Sol. Jo. 382.

The English form of oath has been subject to numerous variations, both in the words of adjuration and the mode of administration. The *Book of Oaths Faithfully Collected from Authentic Books of Record*, published in 1689, gives five different forms of adjuration which appear to have been used indifferently at that time, and which are historically worth preserving. "So help you God in Christ Jesus"; "So help you God and all Saints"; "So help me God at His holy dome" (the word "dome" is defined in Jacob's *Law Dict.*, tit. "Oath," as meaning judgment); "So help you God and the contents of this Book"; "So help you God and these holy evangelists by you bodily touched." It is clear from the words of the last of these forms that the witness was sometimes required to touch a copy of the Gospels. This touching of the Gospels did not involve kissing the Book on which the oath was administered, for Lord Coke (3 *Co. Inst.* 165, Ed. 1681) describes the process thus: "It is called a corporall oath, because he toucheth *with his hand* some part of the holy Scripture." It is not without interest to notice in passing, that, according to one of the forms given above, the practice of swearing by the saints was in force in England for over a hundred years after the Reformation of the Anglican Church. It does not seem possible to fix the date of the first introduction of the objectionable practice of "kissing the Book" in swearing, for there is no trace of any direct authority for it in any Act of Parliament, or rule, or book of practice. There is no doubt that isolated instances of it occurred as early as the fourteenth century. But it is clear from the above passage in Coke's *Institutes* that, according to the ordinary and accepted method of taking the oath, it had not become a recognised form down to the middle of the seventeenth century. It certainly existed towards the latter part of the eighteenth century, and may possibly have been generally adopted in England about that time, when the earliest Bible Societies had disseminated among the people the Authorised Version of the Bible. The present English form of oath is—(1) for promissory oaths, "I swear that, etc., so help me God"; and (2) for other oaths, "You do swear that, etc., so help you God,"—the person sworn in both cases kissing the Bible or Testament.

II. PROMISSORY OATHS.

Abolition of Unnecessary Oaths.—During the seventeenth and eighteenth centuries the propensity to multiply promissory oaths of office was carried to absurd lengths. The *Book of Oaths* above referred to contains the most solemn forms of oath for persons accepting the most trivial positions. Even a worsted weaver and a Kidderminster weaver were required to swear that they would faithfully discharge the duties of their office; and a form is given of an oath to be taken by an ale-taster: "You do swear that you shall well and truly execute the office of ale-taster within this Leet. You shall see that all victuals, bread, and beer put to sale within this Leet be sweet and wholesome," etc. The present rule with regard to promissory oaths was established by the Promissory Oaths Act, 1868, which prescribed the forms of the oath of allegiance, the official oath, and the judicial oath, which the holders of certain specified offices and positions were required to take, and abolished a large number of other oaths. The saving clause in this Act retained the oath required by the Parliamentary Oaths Act, 1866 (29 & 30 Vict. c. 19), and those prescribed for privy councillors, bishops,

peers, baronets, knights, soldiers, militia, volunteers, and aliens on naturalisation; those under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, s. 18), and those required for the purpose of legal proceedings by Act of Parliament or custom. In the case of the holders of all other offices a declaration was substituted for a promissory oath.

Forms: Oath of Allegiance.—I, —, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, her heirs and successors, according to law. So help me God. And see OATH OF ALLEGIANCE.

Official Oath.—I, —, do swear that I will well and truly serve Her Majesty Queen Victoria in the office of —. So help me God.

Judicial Oath.—I, —, do swear that I will well and truly serve Her Majesty Queen Victoria in the office of —, and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will. So help me God.

The Oaths Act, 1888 (see IV. "Affirmations," *infra*), allows an affirmation in lieu of an oath in certain cases (s. 1), and also allows every person to whom an oath is administered to swear in Scotch form if he desires to do so.

III. OATHS IN COURTS OF JUSTICE.

Authority for their Retention.—The Statutory Declarations Act, 1835, s. 7 (see IV. "Declaration," *infra*), contains a saving clause as to oaths in Courts of justice. This section preserves the use of any oath, affirmation, and affidavit which "now is or hereafter may be made or taken, or be required to be made or taken, in any judicial proceeding in any Court of justice, or in any proceeding for or by way of summary conviction before any justice or justices of the peace." Sec. 14 of the Promissory Oaths Act, 1868 (*supra*), also provides for the retention of "any oath required to be taken by any juror, witness, or other person, in pursuance of any Act of Parliament or custom as preliminary to or in the course of any civil, military, criminal, or other trial, inquest, or proceeding of a judicial nature, including any arbitration, or as preliminary to or in the course of any proceedings before a committee of either House of Parliament, or before any Commissioner or other special tribunal appointed by the Crown."

Methods of administering the Oath.—The ordinary form of English oath has already been given above (I. "Form of Oath"), but as one essential feature of this oath is the use of the Bible or Testament in addition to the invocation of the Deity, a doctrinal element is introduced which debars persons other than Christians and Jews from taking it. To meet this difficulty, the Oaths Act, 1838 (1 & 2 Vict. c. 105), was passed, which provides that any person may be sworn "in such form and with such ceremonies as such person may declare to be binding," and that an oath so administered shall be binding. Under this Act, Buddhists have been sworn by "the Three Holy Existences, Buddha, Dhamma, and Pro Sangha, and the Devotees of the twenty-two firmaments"; a Mohammedan on the Koran; a Parsee on the Zend-Avesta, or by binding a "Holy Cord" round his body; and a Chinaman by breaking a saucer into fragments and saying the words: "I tell the truth and the whole truth—if not, as that saucer is broken may my soul be broken like it." But though the Act has been of some service, it has been practically a failure, because foreign witnesses, unable to take the English oath, were not often prepared with a ready-made form of oath which would bind their consciences.

The Oaths Act, 1888, besides permitting an affirmation in lieu of an oath in certain cases (see IV. *infra*), contains a section which, during the last two or three years, has acquired unexpected notoriety and importance. Sec. 5 of that Act is as follows:—"If any person to whom an oath is administered desires to swear with uplifted hand in the form and manner in which an oath is usually administered in Scotland (see I. "Forms of Oath," *supra*), he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further question." This section is said to have been introduced for the purpose of enabling Scottish witnesses to be sworn according to their own form in any part of the United Kingdom; but some few years ago the medical profession found in it a means of escape from the necessity of "kissing the Book" in swearing, a practice which medical men were unanimous in declaring was calculated to spread disease, especially in Police Courts and Coroners' Courts, where the same copy of the Testament was in use for years, and daily kissed by numbers of people of the lowest class and most uncleanly habits. In adopting this attitude, doctors met with considerable resistance from judges and officials in the Courts, but this resistance was overruled by the highest authority (see circular letter from the Home Office to justices and coroners, issued 31st May 1893), and may now be considered to have been overcome; and it is to the medical profession and its organs in the press that the public owe the full recognition which now obtains of the absolute right of every person to be sworn for every purpose in Scotch form without the use of any book, and without any question being asked.

IV. AFFIRMATIONS AND DECLARATIONS.

Affirmations.—The Oaths Act, 1888 (51 & 52 Vict. c. 46), introduced the first general relaxation of the law requiring oaths to be taken for certain purposes. Affirmations had previously been allowed for certain sects. The Quakers and Moravians Acts, 1833 and 1838 (3 & 4 Will. iv. c. 49, and 1 & 2 Vict. c. 77), had relieved members of the sects named from taking the oath, but nothing had been done to relieve those who had no religious belief from the necessity of swearing by a Deity in whom they did not believe. The Oaths Act, 1888, provides that every person, upon objecting to be sworn, and stating as the ground of such objection either that he has no religious belief or that the taking of an oath is contrary to his religious belief, shall be entitled to affirm in lieu of swearing "in all places and for all purposes where an oath is or shall be required by law." This Act has now practically superseded the Quakers and Moravians Acts, which, however, have not been repealed.

Form of Affirmation.—I, —, do solemnly, sincerely, and truly declare and affirm that, etc.

Declarations.—The Statutory Declaration Act, 1835 (5 & 6 Will. iv. c. 62), substituted declarations for oaths required for official and departmental purposes, and for a great number of other purposes, and further authorised the Treasury and certain universities and other bodies to make orders and by-laws extending the operation of the Act. As pointed out above (III. *supra*), oaths in Courts of Justice were specially excepted from the operation of this Act. A statutory declaration, therefore, is not evidence in a Court of law.

Form of Declaration.—I, —, do solemnly and sincerely declare that, etc., and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1835.

V. PERSONS AUTHORISED TO ADMINISTER OATHS.

Commissioners for Oaths.—The Commissioners for Oaths Act, 1889 (52 Vict. c. 10), confers upon Commissioners for Oaths, appointed by the Lord Chancellor, the power to administer any oath, affirmation, affidavit, declaration, or protestation, or take any bail or recognisance, for the purposes of any Court or matter in England. The only exceptions appear to be the following:—The general powers so conferred do not carry with them the right to take a married woman's acknowledgment under the Fines and Recoveries Act, 1833 (3 & 4 Will. iv. c. 74), s. 79, which can only be taken by a judge of the High Court, a judge of a County Court (see County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 184), and a perpetual Commissioner, or special Commissioner appointed under the Fines and Recoveries Act (see Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 7); nor is a Commissioner for Oaths empowered to take the affidavit required by the Marriage Act, 1823 (4 Geo. iv. c. 76), s. 14, which must be sworn before the Surrogate (see Stringer's *Oaths*, 2nd ed., p. 24); nor the declaration under the Ballot Act, 1872 (35 & 36 Vict. c. 33), sched. i. r. 54; nor that under the Corrupt Practices Act, 1883 (46 & 47 Vict. c. 51), s. 33 (2), which must be sworn before a justice of the peace. The principle underlying these exceptions would no doubt apply to every other case in which an Act of Parliament provides that any oath, affirmation, or declaration prescribed shall be taken before the holder of some specified office other than that of Commissioner; in which case a Commissioner for Oaths would be precluded from acting as Commissioner.

Commissioner's power to act for Courts beyond the Jurisdiction.—An English Commissioner may swear affidavits, etc., for use in the Supreme Court in Ireland (Supreme Court of Judicature (Ireland) Act, 1877, (40 & 41 Vict. c. 57) s. 74); and for the Bankruptcy and Civil Bill Courts in Ireland, and for the Courts of Jersey and the Isle of Man; but not for the Scotch Courts, or those of Guernsey. As to other Colonial Courts, the acts of ordinary English Commissioners are accepted in some Colonies, while in others, affidavits, etc., for use in the Colonial Court must be sworn in England before Commissioners holding special commissions from that Court. (For authorities on these points, see Stringer's *Oaths*, 2nd ed., pp. 27–31.) Where an English Commissioner swears an affidavit for use in Ireland, it is necessary that he should comply with Order 38, r. 13, of the Irish Rules of the Supreme Court, 1891, and add to the jurat a certificate, either that he knows the deponent, or that he knows some person (to be named in the jurat), who certifies his knowledge of the deponent.

Commissioner interested not to Act.—A Commissioner who is a party in any proceedings, or interested therein, or is a solicitor, agent, or correspondent of any party thereto, or is clerk to or partner of any solicitor or person so concerned or interested, is not permitted to act as Commissioner in any such proceedings (see Commissioners for Oaths Act, 1889, s. 1 (3); R. S. C. Order 38, r. 16; County Court Rules, 1889, Order 19, r. 7; and direction of the Lord Chancellor, published in 35 *Solicitors' Journal*, 689).

Other Persons authorised to administer Oaths.—A judge in Court has power to administer any oath, and has moreover authority to delegate that power. "Every person who, being an officer of, or performing duties in relation to any Court, is for the time being so authorised by a judge of the Court, or by, or in pursuance of any rules or orders regulating the procedure

of the Court, shall have authority to administer any oath, or take any affidavit required for any purpose connected with his duties" (Oaths Act, 1888, s. 2). It is under this authority that the questionable practice prevails in police Courts of imposing the duty of swearing witnesses upon the usher.

Justices of the peace have power to administer oaths in England for county Courts, and for many other purposes, but this power does not extend to any oath or attestation required for use in the supreme Court. Power to administer oaths also attaches to the following offices:—Masters of the Supreme Court (R. S. C. Order 61, r. 5; Order 55, r. 16); Chancery Taxing Masters (Order 65, r. 27, reg. 25); Registrars (Commissioners for Oaths Act, 1889, s. 2); District Registrars of the High Court (Order 35, r. 6); First and second class clerks in the Filing, Bills of Sale, and Crown Office Departments of the Central Office (Order 61, r. 5; Bills of Sale Rules, 1883, r. 12; Crown Office Rules, 1886, r. 9); Arbitrators acting under a submission or order of reference (Arbitration Act, 1889 (52 & 53 Vict. c. 49) s. 7); Liquidators acting under the Companies Winding-up Acts (Companies Winding-up Rules, 1890, r. 114); Commissioners of Customs on an Inquiry (Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36) s. 33); and any person acting under Act of Parliament or commission, or authority from the Court to take any evidence or hold any inquiry.

Persons having Authority abroad to swear Affidavits for the English Courts.—An affidavit for use in England may be sworn in Scotland and Ireland, and in any British possession beyond the seas, before a justice of the peace, magistrate, judge, Commissioner for Oaths, notary public, or any person having authority to administer an oath there. In foreign countries (except Germany), the affidavit must be sworn before the British Consul or Vice-consul, or if sworn before a notary public must be verified by the British Consul; or it may be sworn before the judge of any local Court of Record, if the verification is obtained of the British Consul or Vice-Consul. In Germany oaths have been abolished, and as this step was not accompanied by any relaxation of the requirements of the English Courts, a position of considerable difficulty has been created.

VI. AFFIDAVITS.

Definition.—"An affidavit is an oath in writing signed by the party deposing, sworn before and attested by him who hath authority to administer the same" (1 Bacon's *Abridgment*, 124).

Essential Requirements.—Most of the requirements which are considered necessary to the validity of an affidavit are contained in Order 38 of the Rules of the Supreme Court, and are based for the most part on old cases. The title to the action or matter must be correctly given (R. S. C. Order 38, r. 2; County Court Rules, Order 19, r. 3).

An affidavit must be written or printed bookwise, that is, continuously from page to page. If written on one side of the paper only, it is informal (*R. v. Judge of City of London Court*, 1891, 34 Sol. Jo. 527). Every alteration must be initialled by the Commissioner (R. S. C. Order 38, r. 12; County Court Rules, Order 19, r. 8). The deponent's name, address, and proper description must be given (R. S. C. Order 38, r. 8), and he must sign his name opposite the jurat at the end of the affidavit. The County Court Rules, Order 9, r. 2, goes still further, and requires "the deponent's age, occupation, quality, and place of residence to be given." The jurat must follow close at the end of the affidavit, so as to preserve its continuity, and must state the time when, and the place where the same was sworn (R. S. C. Order 38, r. 5), and must not omit to conclude with the words

"Before me," followed by the signature of the Commissioner or other person before whom it was sworn, and the designation "Commissioner for Oaths," or as the case may be. In a case of *Eddowes v. Argentine Republic* (1890, 59 L. J. Ch. 392), the Court of Appeal affirmed the decision of Kekewich, J., ordering an affidavit sworn abroad to be filed, from which the words "Before me" had been omitted. Formerly any deviation from the requirements we have mentioned was fatal, but now discretion is given to the Court by R. S. C. Order 38, r. 14, to file an affidavit which is defective in form or fails to meet every official requirement. It should be added, however, that the Court is extremely guarded in exercising this discretion, and failure to comply with any of the requirements we have mentioned is generally fatal to the validity of the affidavit.

Methods of Swearing.—All the enactments and rules applicable to the form and manner of administering the oath referred to above apply equally to an affidavit. The oath may therefore be administered either in the English or Scotch form, or in any other form allowed by law.

Affidavit Sworn on Sunday.—It seems clear that an affidavit sworn on a Sunday is valid, and although in an old case an affidavit so sworn was taken off the file, the reason was that it purported to be sworn before the Court, which did not sit on that day (see Stringer's *Oaths*, 2nd ed., p. 66).

Affirmation in lieu of Affidavit.—A person having no religious belief, or to whose religious belief the taking of an oath is contrary, has the same right to affirm to a written deposition or affirmation as to evidence given by word of mouth (see "Affirmations," *supra*).

Exhibits and Schedules.—Every exhibit to an affidavit or written affirmation must be signed by the Commissioner and identified, whether it is annexed to the document or not; and a schedule appended thereto must be signed at the end.

Forms of Oath and Affidavit in Particular Cases.—For special forms for swearing several deponents, illiterate or blind deponents, deaf-mutes, foreign deponent through interpreter, etc., see Stringer's *Oaths*, and Ford on *Oaths*.

See further OATH OF ALLEGIANCE; OATH, PARLIAMENTARY.

[*Authorities.*—Coke's *Institutes*, 4th ed., 1681; *Book of Oaths* (Anon.), 1689; Blackstone's *Commentaries*, 16th ed., 1825; Stephen's *Commentaries*, 1841; Bacon's *Abridgment*, 7th ed., 1832; Jacob's *Law Dictionary*, 1772; Tidd's *Forms*, 1840; *Encyclopædia Britannica*, 9th ed.; Chambers's *Encyclopædia*, ed. 1891; *New American Encyclopædia*, 1860; *London Encyclopædia*, 1836; Stringer's *Oaths*, 2nd ed.]

Oath of Allegiance (ON NATURALISATION).—An alien on becoming a naturalised British subject is required (33 & 34 Vict. c. 14, s. 9) to take an oath of allegiance in the following form:—

I, _____, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, her heirs and successors according to law. So help me God.

By the Naturalisation Oaths Act (33 & 34 Vict. c. 102), making or subscribing a false declaration is a misdemeanour punishable with twelve months' imprisonment, with or without hard labour (s. 2).

The Government regulations, framed under powers granted by the Naturalisation Acts, 1870, as to oaths of allegiance, are as follows:—

The following persons may administer the oath of allegiance:—In England or Ireland: any Justice of the Peace, or any Commissioner authorised to administer oaths

in Chancery. In Scotland: any Sheriff, Sheriff-Substitute, or Justice of the Peace. Elsewhere in Her Majesty's dominions: any judge of any Court of civil or criminal jurisdiction, any Justice of the Peace, any officer for the time being authorised by law, in the place in which the deponent is, to administer an oath for any judicial or other legal purpose.

This regulation does not apply to the oath of allegiance taken in respect of the declaration of British nationality, for which provision is made by sec. 6 of the Naturalisation Act, 1870; that is, where a British subject has become an alien and is desirous of remaining a British subject, in which case it is provided as follows:—

If the declarant be in the United Kingdom, in the presence of a Justice of the Peace; if elsewhere in Her Majesty's dominions, in the presence of any judge of any Court of civil or criminal jurisdiction, of any Justice of the Peace, or of any other officer for the time being authorised by law, in the place in which the declarant is, to administer an oath for any judicial or other legal purpose; if out of Her Majesty's dominions, in the presence of any officer in the diplomatic or consular service of Her Majesty.

An oath of allegiance, according to the above-quoted regulations, may be proved in any legal proceeding by the production of the original certificate, or of any copy thereof certified to be a true copy by one of Her Majesty's Principal or Under Secretaries of State; but this regulation applies exclusively to oaths taken and subscribed in the United Kingdom.

Oath, Parliamentary.—"It had been customary," says Sir William Anson (*The Law and Custom of the Constitution*, 3rd ed., p. 61—on what authority does not appear), "for members of both Houses of Parliament to take the oath of allegiance from the year 1534 onwards, and the oath of supremacy from the year 1558."

In 1558 was passed the Act of Supremacy (1 Eliz. c. 1), containing in sec. 19 the oath of the Queen's supremacy (repealed by 1 Will. & Mary, sess. 1, c. 8, s. 2). An Act of 1562 (5 Eliz. c. 1; repealed 9 & 10 Vict. c. 59, s. 1) enacts (ss. 16, 17)—

That every person which hereafter shall be elected or appointed a knight, citizen or burgess, or baron for any of the five ports, for any Parliament or Parliaments hereafter to be holden, shall from henceforth, before he shall enter into the Parliament House, or have any voice there, openly receive and pronounce the said oath before the Lord Steward for the time being, or his deputy or deputies for that time to be appointed; (2) and that he which shall enter into the Parliament House without taking the said oath, shall be deemed no knight, citizen, burgess, nor baron for that Parliament, nor shall have any voice, but shall be to all intents, constructions, and purposes as if he had never been returned nor elected knight, citizen, burgess, or baron for that Parliament, and shall suffer such pains and penalties as if he had presumed to sit in the same without election, return, or authority.

Provided always, that forasmuch as the Queen's Majesty is otherwise sufficiently assured of the faith and loyalty of the temporal lords of her High Court of Parliament, therefore this Act, nor anything therein contained, shall not extend to compel any temporal person, of or above the degree of a baron of this realm, to take or pronounce the oath abovesaid, nor to incur any penalty limited by this Act for not taking or refusing the same; anything in this Act to the contrary in anywise notwithstanding.

An oath of allegiance was imposed on certain persons by 3 Jac. I. c. 4 (1605), and was extended by 7 Jac. I. c. 6 (1609), to members of the two Houses (ss. 4 and 8). Both oaths were abrogated by 1 Will. & Mary, c. 8, s. 2, others being appointed in their stead. By 30 Car. II. c. 1 (ss. 1-4), the oaths had to be taken, and a declaration against transubstantiation made, by members of each House in his respective House. The

declaration was only abolished by the Roman Catholic Relief Act of 1829. (For historical purposes, see also 1 Will. & Mary, c. 1, s. 13 (1688); 13 Will. III. c. 6 (1701), which imposed the oath of abjuration, *i.e.* of any right to the throne in the descendants of James II.; 1 Geo. I. st. 2, c. 13 (1714)). Statutes have been made to permit Quakers to make affirmations instead of oaths (7 & 8 Will. III. c. 34; 6 Anne, c. 23; 1 Geo. I. st. 2, c. 6 and c. 13; 8 Geo. I. c. 6; 22 Geo. II. c. 46), some not dealing ostensibly with the parliamentary oaths; but they were so construed in 1833 that Mr. Pease, on taking his seat, was allowed to affirm (see also 21 & 22 Vict. c. 48, s. 4).

"This privilege was extended by various Acts to Moravians and Separatists (3 & 4 Will. IV. c. 49; 1 & 2 Vict. c. 77; 3 & 4 Will. IV. c. 82; 29 & 30 Vict. c. 19; 31 & 32 Vict. c. 72)" (Ersikine May). By 21 & 22 Vict. c. 48, s. 1 (1858), one oath only, embodying the substance of the former three oaths, was required (saving all existing rights).

For the phases of the relief of Jewish parliamentary disabilities, see the authorities cited below. By 29 & 30 Vict. c. 19 (The Parliamentary Oaths Act, 1866), one uniform oath (containing no reference to Christianity) was to be taken by members of both Houses of Parliament on taking their seats in every Parliament, "the time and manner of taking it" was regulated, many former enactments on the subject were repealed, and existing rights were saved, *i.e.* mainly of Quakers (all other religious sectaries being now able to take the oath set out in sec. 1 without scruple).

Finally, for this form was expressly substituted, by 31 & 32 Vict. c. 72, ss. 2 and 8 (The Promissory Oaths Act, 1868), the following (existing rights being again saved):—

"I, _____, do swear that I will be faithful and bear true allegiance to [the sovereign of this kingdom for the time being (s. 10)], her [or his] heirs and successors according to law. So help me God."

And this is the form now in use.

The penalty for omitting to take this oath is prescribed by sec. 5 of the Parliamentary Oaths Act: "If any member of the House of Peers votes by himself or his proxy in the House of Peers, or sits as a peer during any debate in the said House, without having made and subscribed the oath hereby appointed, he shall for every such offence be subject to a penalty of five hundred pounds, to be recovered by action in one of Her Majesty's Superior Courts at Westminster; and if any member of the House of Commons votes as such in the said House, or sits during any debate after the Speaker has been chosen, without having made and subscribed the oath hereby appointed, he shall be subject to a like penalty for every such offence, and, in addition to such penalty, his seat shall be vacated in the same manner as if he were dead." But an unsworn member is only debarred from sitting or voting; he is entitled to all other privileges, and subject to all other duties.

The penalty incurred under the section just quoted is not recoverable by a common informer: only the Crown can sue for it (*Clarke v. Bradlaugh*, 1883, 8 App. Cas. 354).

The Court of Appeal has held that a member who does not believe in the existence of a Supreme Being, and upon whom an oath has no binding effect as an oath, but only as a solemn promise, cannot take the oath under the Act of 1866, and that that oath can only be taken with the assent of the House in accordance with its Standing Orders (and cannot, for example, be administered to a member by himself) (*A.-G. v. Bradlaugh*, 1885, 14 Q. B. D. 667).

When members have incurred this penalty through accident, they have been generally relieved from it by an Act of indemnity.

"Sitting" in the House, for the purposes of this section, means, at any rate in the Commons, above the bar.

The Speaker has no authority to prevent a member from taking the oath (141 *Commons Journal*, 5), but the House has (*Bradlaugh v. Gossett*, 12 Q. B. D. 281). The question connected with the name of the plaintiff in that action was settled by the passing of 51 & 52 Vict. c. 46 (The Oaths Act, 1888), of which sec. 1 enacts: "Every person upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, etc." By sec. 2 the following is to be the form of affirmation:—I, A. B., do solemnly, sincerely, and truly declare and affirm" next, the words of the oath prescribed by law, omitting any words of imprecation or calling to witness. By sec. 3 the validity of an oath, once duly administered and taken, is not affected by the fact that the taker had no religious belief. Note that this statute does not provide for the case of a person who, having a religious belief, states that it does not affect the obligation of an oath on his conscience: it would seem that such a person could not legally affirm.

Witnesses before Parliamentary Committees, or at the bar of the House, may be sworn (or affirm) in the ordinary way (34 & 35 Vict. c. 83).

[*Authorities*.—Anson, work cited above; May's *Parliamentary Practice*, 10th ed.]

Obiter dictum.—*Obiter dictum* is an expression of opinion (formed) by a judge on a question immaterial to the *ratio decidendi*, and unnecessary for the decision of the particular case. It is in no way binding on any Court, but may receive attention as being an opinion of high authority. "Mr. Justice Willes declared that he should give no *obiter* opinion about personal property or stock-in-trade being liable to be rated" (*R. v. Canterbury*, 1769, 4 Burr. 2294).

Oblations.—See OFFERINGS.

Obligation.—See JURISPRUDENCE.

Obscene Words; Libels; Publications.—The Court of Star Chamber originally claimed jurisdiction to punish persons who offended against good order and morality by any obscene and vicious acts committed in public. After the abolition of the Star Chamber, the Court of Queen's Bench assumed a similar power to act as *custos morum* (see *Sir Charles Sedley's* case, 1663, 1 Keb. 620; 1 Sid. 168). At first this jurisdiction was very doubtful. When a man called Read was indicted for publishing an obscene libel, Holt, C.J., expressed a strong opinion that such a publication was a purely ecclesiastical offence not punishable in the temporal Courts (*Read's* case, 1708, Fortes. 98; 11 Mod. 142). But afterwards, in *R. v. Curl*, 1727, 1 Barnard. 29; 2 Stra. 788, the Court of Queen's Bench decided that such a book was "punishable at common law, as an offence against the peace, intending to weaken the bonds of civil

society, virtue, or morality." And now the law is clear. To publish any obscene or immoral books or pictures is a misdemeanour, punishable at common law on indictment or information with fine and imprisonment with or without hard labour (*R. v. Wilkes*, 1770, 4 Burr. 2527; *R. v. Hicklin*, 1868, L. R. 3 Q. B. 360, 371). To obtain and procure obscene books or pictures for the purpose of uttering and selling them is also a misdemeanour, indictable at common law (*Dugdale v. R.*, 1853, 1 El. & Bl. 425; 22 L. J. M. C. 50; but see *R. v. Rosenstein*, 1826, 2 Car. & P. 414). Both these offences are triable at Quarter Sessions. It was formerly necessary to set out in the indictment the obscene words in full (*Bradlaugh and Besant v. R.*, 1878, 3 Q. B. D. 607). But now, by sec. 7 of the Law of Libel Amendment Act, 1888, it is sufficient to deposit in Court the book or other documents, and to refer to it in the indictment with sufficient particularity to identify the passages deemed obscene.

The test of obscenity laid down by Cockburn, L.C.J., in *R. v. Hicklin*, *supra*, was this: "Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." If the work be obscene within this rule, its publication is an indictable misdemeanour, however innocent may be the motive of the publisher (*ibid.*). That the publication is an accurate report of a judicial proceeding is no defence to an indictment, if it contain matter of an obscene and demoralising character (*Steele v. Brannan*, 1872, L. R. 7 C. P. 261).

A summary method of suppressing obscene publications is provided by the Statute 20 & 21 Vict. c. 83. If anyone reasonably believes that any obscene books or pictures are kept in any place for the purpose of being sold or exhibited for gain, he may make a complaint on oath before the police magistrate, stipendiary magistrate, or any two justices, having jurisdiction over such place. The Court must be satisfied that such belief is well founded, and for that purpose the complainant must also state on oath that at least one such book or picture has in fact been sold or exhibited for gain in such place. The Court must also be satisfied that such book or picture is so obscene that its publication would be a misdemeanour, proper to be prosecuted as such. Thereupon the Court will issue a special warrant authorising its officer to search for and seize all such books and pictures, and bring them into Court. Then a summons is issued calling upon the occupier of the place to appear and show cause why such books and pictures should not be destroyed. Either the owner, or any other person claiming to be the owner, of such books and pictures may appear; but if no one appears, or if, in spite of appearance, the Court is still satisfied that the books and pictures, or any of them, are of such a character that their publication would be a misdemeanour proper to be prosecuted, it must order them to be destroyed; if not so satisfied, it must order them to be restored to the occupier of the place in which they were seized. The order for the destruction of such books must state, not only that the Court is satisfied that the books are obscene, but also that it is satisfied that the publication of them would be a misdemeanour, proper to be prosecuted as such; else such order will be bad on the face of it, as not showing jurisdiction, and a *certiorari* will be granted, in spite of the 2 & 3 Vict. c. 71, s. 49, to bring it up and quash it (*Ex parte Bradlaugh*, 1878, 3 Q. B. D. 509).

Any person aggrieved by the determination of the justices may appeal to Quarter Sessions by giving notice in writing of such appeal, and of the grounds thereof, and entering into a recognisance, within seven days after

such determination. The books and pictures ordered to be destroyed will be impounded during such seven days; on the eighth day, if no notice of appeal be given, they will be destroyed. If the appeal be dismissed, or not prosecuted, the Court of Quarter Sessions may order the books and pictures to be destroyed. The death of the complainant after the issuing of the summons will not cause the proceedings to lapse (*R. v. Truelove*, 1880, 5 Q. B. D. 336). If any point of law arises in any proceeding under this Act, the Court may state a case for the opinion of a superior Court, under the 20 & 21 Vict. c. 43, or the 43 & 44 Vict. c. 49, irrespective of the power of appeal given by sec. 4.

Anyone who openly exposes or exhibits any indecent exhibition or obscene prints or pictures in any street, road, public place or highway, or in any window or other part of any house situate in any street, road, public place or highway, shall be deemed a rogue and vagabond, and punished on summary conviction (5 Geo. IV. c. 83, s. 4, as explained by the 1 & 2 Vict. c. 38, s. 2).

The Postmaster-General may prevent the delivery by post of any obscene or indecent prints, photographs, or books (33 & 34 Vict. c. 79, s. 20).

As to indecent advertisements, see the Statute 52 & 53 Vict. c. 18, and ADVERTISEMENTS, INDECENT, vol. i. p. 163.

Observance.—"Observe" and "observance" are used with reference to negative covenants in the same way as "perform" and "performance" are used with reference to affirmative covenants. So the proviso for re-entry in a lease is almost invariably expressed to be in the event of the non-performance or non-observance of any of the covenants; and the covenants are referred to as covenants to be performed and observed. "A man is bound to perform all the covenants in an indenture; if all the covenants be in the affirmative, he may generally plead performance of all; but if any be in the negative, to so many he must plead specially (for a negative cannot be performed), and to the rest generally (*Co. Litt.* 303 *b*). On this it has been stated at times that the word "performance" does not apply to negative covenants; and in *Hyde v. Warden*, 1877, 3 Ex. D. 73, the head note says (*semble*) that a power of re-entry upon the lessee wilfully failing or neglecting to perform any covenant does not apply to a breach of a negative covenant. And see *West v. Dobb*, 1870, L. R. 5 Q. B. 460.

But there has been no express decision on the subject, and as a matter of common sense, apart from any legal refinement, anyone would say that if a man covenants not to do a certain thing and does it, the doing is a non-performance of his covenant (see *Evans v. Davis*, 1878, 10 Ch. D. 747, 757). The cases are examined in Stroud's *Judicial Dictionary*, *sub tit.* "Observance or Performance." See LANDLORD AND TENANT.

Obstruction.—This term is used in law mainly in two senses: (1) Interference with public or private rights or easements, particularly of light, way, navigation, or watercourse; (2) interference with officers of justice in the execution of their duty.

(1) The obstruction of private rights of way or water gives a right of action for the injury done, which is in substance for a nuisance, though usually coupled with application for equitable relief by injunction to prevent its recurrence. When the obstruction is attended by deliberate

damage, a criminal remedy is given under the Malicious Damage Act, 1861 ; but the summary jurisdiction of justices is ousted if the act is done under *bonâ fide* and reasonable claim of right, and no more damage was done than was necessary to assert the claim (see *R. v. Clemens*, [1898] 1 Q. B. 556). See EASEMENT ; MALICIOUS DAMAGE.

The usual remedy for obstruction of a public right of way is by indictment or information for public nuisance. See HIGHWAYS, vol. vi. p. 200.

(2) Interference with officers of justice is dealt with under ASSAULT ; ARREST ; POLICE ; RESCUE ; and SHERIFF.

Obtaining—

Credit (by undischarged bankrupt).—See vol. i. p. 523 ; vol. v. p. 509.

Final Judgment under sec. 4 (g) Bankruptcy Act, 1883.—See vol. i. p. 489.

Goods by False Pretences.—See vol. v. p. 317.

Obventions.—See OFFERINGS.

Obvious Imitation.—See DESIGNS, vol. iv. p. 236.

Occupation.—The term “occupation” denotes (1) the actual possession of land ; and (2) the act of taking possession of a thing, whether moveable or immoveable, the possession of which was previously vacant ; more shortly, the act of taking original possession. Where no other person is entitled to possession, occupation confers a title to the ownership of the thing.

(1) Occupation, in the sense of the actual possession of land, requires that the occupier should have exclusive control (see POSSESSION), and it is the test whether an instrument conferring an interest in land operates as a lease or as a licence. There is no tenancy created unless the owner parts with exclusive possession of the land (*Taylor v. Caldwell*, 1863, 3 B. & S. 832 ; *Hancock v. Austin*, 1863, 14 C. B. N. S. 634). In practice the question of occupation usually arises in connection with the liability to poor-rates. If the owner retains control of the premises, he is regarded as continuing in occupation, and the rates fall upon him (*Allan v. Liverpool*, 1874, L. R. 9 Q. B. 180 ; *London & North-Western Ry. Co. v. Buckmaster*, 1874, L. R. 10 Q. B. 70) ; but exclusive occupation imposes the liability upon the tenant (*Taylor v. Pendleton*, 1887, 19 Q. B. D. 288).

(2) Occupation in the sense of acquiring original possession is chiefly of importance in public international law (see the discussion of the subject in Westlake's *Principles of International Law*, p. 155, and article OCCUPATION, INTERNATIONAL). Occupation confers a title to newly-discovered territory ; but for this purpose mere discovery is not sufficient, nor is it enough that it is followed by a formal act of annexation. It is further necessary that there should be an actual settlement in the country, and the establishment of a civilised administration (Lawrence, *International Law*, p. 148). The question of title by occupation, which was formerly of practical

importance in connection with the settlement of America (Wheaton's *International Law*, pt. ii. chap. iv.), has been revived in recent times by the colonisation of Africa; but an attempt has been made to avoid international conflict by delimiting, by treaty, tracts of land as "spheres of influence," each nation being free to acquire by occupation any territory within the sphere of influence assigned to it (Westlake, *op. cit.* p. 187).

In English private law it was formerly possible to gain a title to land by special or general occupancy in a case where the owner of an estate *pur autre vie* died in the lifetime of the *cestui-que vie* (*Co. Litt.* 41 *b*); but now the vacancy in the possession is prevented by secs. 3 and 6 of the Wills Act, 1837 (replacing sec. 12 of the Statute of Frauds), which provide for the disposition of the estate *pur autre vie* on the death of the owner. And it may still be possible, under exceptional circumstances, for the freehold to be in abeyance (Challis, *Real Property*, 2nd ed., p. 91), so that, if there is no occupier, a person entering without title would acquire possession by occupation (Pollock and Wright, *Possession*, p. 46). But for practical purposes the acquisition of possession of land by occupation is not possible, the whole country being parcelled out among existing occupiers or other persons recognised as having the legal possession (see Pollock and Wright, p. 45).

The term "occupation" is applied also to the original acquisition of possession of goods, and the cases in which it can occur have been classified as follows (Pollock and Wright, *Possession*, p. 124):—

(1) Capture of wild animals (see POSSESSION); (2) appropriation of free natural elements, such as water; (3) the collection of matter, such as seaweed, from the sea or shore; (4) severance of a thing from the soil, or from a tree or plant attached to the soil; and (5) perhaps the finding of a thing which has been abandoned by or irretrievably lost to its former owner.

Occupation, International.—For military occupation, see WAR. In international law, in time of peace, occupation is the term applied to the act by which a State occupies territory not under the actual sovereignty of any other State (*res nullius civitatis*). And here we must distinguish between private and international law, though the doctrine of the latter is founded upon the Roman law of title by occupancy: *quod nullius est, id ratione naturali occupanti conceditur* (*D.* 41. 1. 3),—a doctrine which has since passed into the currency of legal thought among all nations.

"Occupancy," says Blackstone, "gave the right to the temporary use of the soil; so it is agreed upon all hands that occupancy gave also the original right to the permanent property in the substance of the earth itself, which excludes everyone else but the owner from the use of it. There is, indeed, some difference among the writers on natural law, concerning the reason why occupancy should convey this right and invest one with this absolute property: Grotius and Puffendorff insisting that this right of occupancy is founded upon a tacit and implied assent of all mankind that the first occupant should become the owner; and Barbeyrac, Titius, Locke, and others holding that there is no such implied assent, neither is it necessary that there should be; for that the very act of occupancy alone, being a degree of bodily labour, is from a principle of natural justice, without any consent or compact, sufficient in itself to gain a title;—a dispute that savours too much of nice and scholastic refinement! However, both sides agree in this, that occupancy is the thing by which the title was in fact originally gained; every man seizing to his own continued use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by anyone else."

(*Commentaries*, 4th ed., 1770, ii. p. 8.)

The subject did not give rise to practical issues as between States until the discovery of America, and the ensuing period of voyages of exploration

and adventure. Then, owing to the difficulty of applying the above rule of private law to vast tracts of territory thousands of miles away from Europe, a new principle came into vogue: that of basing title on priority of discovery.

The principle that countries inhabited by pagans and infidels belonged to the Christian nation which first discovered them was followed throughout the sixteenth century. Thus the patent delivered on May 5, 1496, by Henry VII. to John Cabot, his sons and their heirs, granted to them the right to navigate with five vessels towards all the regions of the eastern, western, and northern seas, under the royal flag, *with a view to discovering* islands, countries, and provinces of either gentiles or infidels in any quarter of the world, and to raise the royal flag in those parts; and delivered over to them, as vassals and lieutenants of the king, the conquests they might make, reserving only the sovereignty thereover.

During the reign of Elizabeth several patents modelled on that granted to Cabot were issued. In 1578 the Queen granted letters patent to Sir Humphrey Gilbert, authorising him to discover all pagan and barbarous countries not possessed by Christian princes or peoples, and to occupy them.

"To discover, find, search out, and view," it ran, "such remote, heathen, and barbarous lands, countries, and territories not actually possessed of any Christian prince or people, as to him, his heirs and assigns, and to every or any of them shall seem good; and the same to have, hold, occupy, and enjoy to him, his heirs and assigns for ever, with all commodities, jurisdictions, and royalties both by sea and by land."

(Nys. *Origines*, p. 368.)

The rising international system had not been at first ready with rules to meet the new emergency, and the first tendency of international law, observes Sir Henry Maine, was to attribute an exaggerated importance to this priority of discovery. It was thought by the earlier jurists to be the same thing in principle as the Roman *inventio*, the form of occupation by which, under the law of nature, property was acquired in a valuable object, such as a jewel belonging to nobody (*Int. Law*, p. 66).

Another source of title at this period which was added to discovery was papal grants. Thus the titles Portugal and Spain first put forward over the Eastern and Western worlds were founded on such grants, and not only on discovery.

Such titles were of course not recognised by Protestant States, and when Mendoza, Philip II.'s ambassador, complained of the expedition of Drake, he fell back for the foundation of his claim on discovery. Elizabeth replied that—

as she did not acknowledge the Spaniards to have any title by donation of the Bishop of Rome, so she knew no right they had to any places other than those they were in actual possession of; for that their having touched only here and there upon a coast, and given names to a few rivers or capes, were such insignificant things as could in no ways entitle them to a propriety further than in the parts where they actually settled and continued to inhabit.

(Camden's *Annals*, 1850. Twiss, *Oregon Question*, p. 161; quoted by Westlake, *Int. Law*, p. 156.)

Here we have a distinct protest against discovery unaccompanied by occupation as a sufficient source of title, and in fact, discovery and occupation or settlement have often been opposed to one another as rival titles—

discovery being regarded with more favour by the old law of nations, and especially forming the base of the Spanish and Portuguese claims, while experience and good sense led to greater stress being laid on occupation or settlement.

(Westlake, *Int. Law*, p. 155.)

With the settling down of States and their transoceanic possessions to a steadier international life, discovery, which, taken alone, could at most be a mere form of intention, lost a great deal of its importance as a source of title.

Among those who most contributed to remove the old confusion was Bynkershoek, who held that occupation must be coincident with actual possession—

“for, if intention had sufficed, anyone might have been able to swallow the universe at a gulp.”

(*De dominio maris*, i.)

At length we find the conditions of occupation laid down by Vattel with the clearness distinguishing that author:

All mankind have an equal right to things that have not yet fallen into the possession of anyone; and those things belong to the person who first takes possession of them. When, therefore, a nation finds a country uninhabited and without an owner, it may lawfully take possession of it; and after it has sufficiently made known its will in this respect, it cannot be deprived of it by any other nation. Thus navigators going on voyages of discovery, furnished with a commission from their sovereign, and meeting with islands or other lands in a desert state, have taken possession of them in the name of their nation; and this title has been usually respected, provided it was soon after followed by a real possession. But it is questioned whether a nation can, by the bare act of taking possession, appropriate to itself countries which it does not really occupy, and thus engross a much greater extent of territory than it is able to people or cultivate. It is not difficult to determine that such a pretension would be an absolute infringement of the natural rights of men and repugnant to the views of nature, which, having destined the whole earth to supply the wants of mankind in general, gives no nation a right to appropriate to itself a country, except for the purpose of making use of it, and not of hindering others from deriving advantage from it. The law of nations will therefore not acknowledge the property and sovereignty of a nation over any uninhabited countries, except those of which it has really taken actual possession, in which it has formed settlements, or of which it makes actual use. In effect, when navigators have met with desert countries in which those of other nations had in their transient visits erected some monument to show their having taken possession of them, they have paid as little regard to that empty ceremony as to the regulation of the popes who divided a great part of the world between the Crowns of Castile and Portugal.

(Vattel, *Law of Nations*, p. 99.)

Since Vattel's time the question of the effect of discovery, what makes occupation valid against all subsequent comers, has again and again arisen, but the subject has remained as he stated it till an attempt was recently made to put it into a more precise form in the General Act of Berlin (see *infra*).

Thus in conferences held in 1826 in London between Commissioners of Great Britain and of the United States on a difficulty between these two States, the British Commissioners stated:

Upon the question how far prior discovery constitutes a legal claim of sovereignty, the law of nations is somewhat vague and undefined. It is, however, admitted by the most approved writers that mere accidental discovery, unattended by exploration, by formally taking possession in the name of the discoverer's sovereign, by occupation and settlement more or less permanent . . . constitutes the lowest degree of title, and that it is only in proportion as first discovery is followed by any or all of these acts that such title is strengthened and confirmed.

(Twiss, *Peace*, p. 201.)

In 1843, in further negotiations between Great Britain and the United States, this question was again mooted. The latter Power expressed the

following view, which practically acknowledged that the old theory for which she was contending was extinct:—

How far the mere discovery of a territory, which is either unsettled or settled only by savages, gives a right to it, is a question which neither the law nor the usage of nations has yet definitely settled. The opinion of mankind upon this point has undergone very great changes with the progress of knowledge and civilisation. Yet it will scarcely be denied that rights acquired by the general consent of civilised nations, even under the erroneous views of an unenlightened age, are protected against the changes of opinion resulting merely from the more liberal or the more just views of after times. The right of nations to countries discovered in the sixteenth century is to be determined by the law of nations as understood *at that time*, and not by the improved and more enlightened opinion of three centuries later.

(Mr. Upshur, Secretary of State, to Mr. Everett, Oct. 9, 1843, MSS. Instruc. Great Britain.)

On the question whether title could be derived by a State through the discovery of a private adventurer, the United States held that—

The ground taken by the British Government, that a discovery made by a private individual in the prosecution of a private enterprise gives no right, cannot be allowed. There is nothing to support it, either in the reason of the case or in the law and usage of nations. To say the least of it, if a discovery so made confers no right, it prevents any other nation from acquiring a right by subsequent discovery, although made under the authority of Government, and with an express view to that object.

(*ibid.*)

The question at issue was decided without further elucidation of this point. Still, it cannot be denied that some respect must be paid to priority of discovery as a commencement of title.

"It is still allowed," wrote Sir H. Maine, "that private discovery, if established, may give legal importance to acts and signs otherwise ambiguous or without validity. A cairn of stones, a flagstaff, or the remains of one, may mean little or nothing if found on a desolate coast; but if it can be shown to have been put up by the first discoverers, it may obtain great significance and importance."

(*International Law*, p. 67.)

And it is agreed that uninterrupted possession for a certain length of time by any State excludes the claim of every other—

in the same manner as . . . by the municipal code of every civilised nation a similar possession by an individual excludes the claim of every other person to the article of property in question.

(Wheaton, *Elements*, ii. 4, 5.)

Thus title by settlement, though originally imperfect, may be perfected by enjoyment during a reasonable lapse of time, the presumption of law from undisturbed possession being, that there is no prior owner, because there is no claimant, and no better proprietary right, because there is no asserted right. The silence of other parties raises a presumption of their acquiescence, and their acquiescence raises a presumption of a defect of title on their part, or of an abandonment of their title (Twiss, *Peace*, p. 211).

Abandonment, according to the decision in the *Delagoa Bay* case (1872–75), where there had been a temporary lapse of control over territory, was held not to be sufficient to invalidate a claim based upon the more or less continuous exercise of authority for centuries.

Questions of occupation at the present day arise chiefly in connection with Africa, though they are not yet extinct in other parts of the world, as shown by the pending Venezuela-Guiana frontier dispute (*q.v.*).

The rules which are to govern the future occupation of the unappro-

priated parts of the African continent were laid down in the General Act of Berlin (Feb. 26, 1885) in the following terms:—

1. The Power which shall henceforth take possession of territory upon the coasts of the African continent situated outside its present possessions, or which, not having had such possessions up to the present, should afterwards acquire them, and the Power which assumes a protectorate thereover, shall accompany such act with a notification addressed to the Powers represented in this conference, in order to enable the said Powers to make, if need be, any counterclaims.

2. The signatory Powers acknowledge the obligation to assure the existence in the territories occupied by them on the coasts of the African continent of a sufficient authority to make vested rights (*droits acquis*) respected, and, if need be, freedom of trade in the conditions in which it may be stipulated.

(Arts. 34 and 35.)

These rules, though they may be taken to express the conditions to which in future occupations States will be expected, as far as possible, to conform, are far from a perfect solution of the difficulties of the subject. To prevent misunderstandings, Powers which have competing interests in Africa have resorted to the delimitation of their respective spheres of interest (*q.v.*), with a view to avoiding the necessity of establishing an authority, which at an early stage is impossible, or, if any, the sufficiency of which might give rise to different opinions. See HINTERLAND.

The Institute of International Law (*q.v.*) at their Lausanne session in 1888, adopted a series of resolutions on the new rules of occupation, which seem to be intended to complete and interpret them. They are as follows:—

Occupation of territory by a sovereign Power cannot be acknowledged as effective unless it conforms to the following conditions:—

(1) The territory of which possession is taken shall be of certain defined limits, and effected in the name of the Government in question; and

(2) There shall be an official notification of the taking of possession.

The taking of possession is accomplished by the establishment of a local responsible authority provided with sufficient means to maintain order, and to assure the regular exercise of its functions within the limits of the occupied territory. These means may be borrowed from the existing institutions of the occupied country.

Notification of the taking of possession shall be made either by publication in the form in which official acts are usually made known in the country of the Government occupying, or through the diplomatic channel. It should contain an approximate delimitation of the territories occupied.

Oregon Question.—In 1844 a difference with reference to the Oregon territory arose between Great Britain and the United States, who claimed the whole valley of the Columbia River, in addition to all the territory between the Rocky Mountains and parallel 54° 40' N. This claim was based upon pretensions advanced as to their natural right, and upon pretensions derived from France and Spain. As against Great Britain the American claim was founded on priority of discovery, exploration, and settlement by American citizens as far back as 1809 and 1810, and claims of France and Spain, to which the United States had succeeded by treaty. The British reply was that the district in question never belonged to France, and was therefore not comprised in the Treaty of Louisiana. As to the Treaty of Florida, Spain had, by a previous treaty with Great Britain, dated 1790, acknowledged in Great Britain certain rights with respect to those parts of the western coast of America not already occupied, the acknowledgment having special reference to the territory in question. As to priority of settlement, it was admitted that a trade establishment had been formed by American citizens in 1811; but it had passed during the war into the hands of British subjects, and was only restored to America in

1818 by an understanding between the two Governments. A treaty was eventually concluded (June 15, 1846), providing that the line of boundary between British and United States territory should be continued westward along the 49th parallel N. to the middle of the channel which separated the continent from Vancouver's Island, and thence southwards through the middle of the channel which separated the continent from Vancouver's Island, and thence southwards through the middle of the channel and of Fuca's Straits to the Pacific Ocean; the right of navigation in the channel and straits being preserved to both parties. Commissioners were appointed to determine the portion of the boundary running southward, but they were unable to agree, Great Britain claiming that the boundary line should be run through the Rosario Straits, and the United States contending that it should run through the Canal de Haro. By the Treaty of Washington, the question was submitted to the arbitration of the German Emperor, who decided in favour of the United States (*The Oregon Claims*, Parliamentary Papers, 1846, vol. lii.; 1873, vol. lxxiv. See Pitt Cobbett's *Leading Cases*).

Delagoa Bay Question.—The Delagoa Bay question arose out of disputes, which lasted from 1823 to 1875 between Great Britain and Portugal, as to their respective claims to Delagoa Bay on the east coast of Africa. The following were the British contentions:—

(1) That the territories, although discovered by the Portuguese, had never been taken possession of by them, and that the Portuguese dominions were bounded on the south by the Dundas or Lorenzo Marques River and by the English River, and on the east by the sea, and had at no time extended to the territories in question; (2) that the whole country south of the Dundas or Lorenzo Marques River and English River had remained free and independent until 1823, the native inhabitants under their chiefs retaining absolute dominion over the territory; and (3) that the chiefs, with the consent of the natives, had ceded the territory to Great Britain in 1823.

The following were the bases of the Portuguese claims:—

(1) That the bay and territory around it had been discovered by them as early as the sixteenth century; (2) that they had continued in occupation and possession of the bay for three centuries; (3) that the bay formed an approach to Portuguese territory; (4) that the territory had been conceded to them by the Emperor of Monomotama in the beginning of the seventeenth century; (5) that a grant had been subsequently made to them by the rulers of Tembe; (6) that an express acknowledgment of their rights had been made by the chiefs of the tribes of Tembe and Mapoota; (7) that their rights had been acknowledged by European nations; and (8) that previously to 1823 their rights had also been acknowledged by the English.

In 1872 the matter was referred to Marshal MacMahon, President of the French Republic, who decided in favour of Portugal on the following grounds:—

(1) That the discovery of the bay had been made by Portugal in the sixteenth century; (2) that Portugal had since claimed sovereignty and exclusive rights of commerce over the place, and had maintained her pretensions against other countries, by whom her claims had not been effectually disputed; (3) that when England concluded a treaty with Portugal in 1817, she did not contest these rights; (4) that in 1822 England recommended Captain Owen, to whom the alleged cession was made, to the good offices of Portugal; (5) that though the weakness of the Portuguese authority in 1823 might have induced Captain Owen to consider the territory as independent of Portugal, yet the treaties subsequently concluded were nevertheless contrary to Portuguese rights; (6) that almost immediately after the departure of the English, the chiefs of Tembe and Mapoota acknowledged their dependence on the Portuguese authorities; (7) that even if the treaties had been made between parties capable of contracting they would now be of no avail, the treaty relating to Tembe containing conditions that had not been performed, those relating to Mapoota having been for periods of time that had expired and not having been renewed.

(*The Delagoa Bay Question*, Parliamentary Papers, 1875, lxxxiii. See Pitt Cobbett's *Leading Cases*.)

American Rule as to Guano Islands.—By an Act of Congress of the United States of America, which was approved August 18, 1856, a general rule was established with regard to the discovery and the use of guano islands by citizens of the United States (U. S. Laws, xi. 119). It regulates the discovery and peaceful taking possession of deposits of guano on islands, rocks, or keys not being within the lawful jurisdiction of any other Government, and not occupied by the citizens of any other Government.

Such island, rock, or key may, at the discretion of the President of the United States aforementioned, be considered as appertaining to the said United States, securing the citizens of the United States the use of the same for removing the guano deposits which they have discovered and legally taken possession of beyond the jurisdiction of any foreign State, with condition to sell or ship the guano to citizens of the United States only, and at rates fixed by statutes. Nevertheless such islands, rocks, or keys are not made part of the territory of the United States, and all acts done and offences or crimes committed thereon or in the waters adjacent thereto are to be held and deemed to have been done or committed on the high seas on board a ship or vessel belonging to the United States, and be punished according to the laws of the United States relating to such ships or vessels and offences committed on the high seas.

(See Ferguson, i. p. 100.)

[*Authorities*.—Grotius, *De jure belli ac pacis*; Bynkershoek, *De dominio maris*, 1703; Blackstone, *Commentaries*, 4th ed., London, 1770; Vattel (Eng. transl.), *Law of Nations*, London, 1797; Wheaton, *Elements of International Law*, ed. Lawrence, London, 1878; Twiss, *Law of Nations in time of Peace*, Oxford, 1884; Salomon, *L'Occupation des Territoires sans Maître*, Paris, 1889; Lawrence, *The Principles of International Law*, London, 1895; Rivier, *Principes du Droit des Gens*, Paris, 1896; Nys, *Les Origines du Droit International*, Paris and Brussels, 1894; Ferguson, *International Law*, London and Hong Kong, 1884; Pitt Cobbett, *Leading Cases in International Law*, London, 2nd ed. 1892; Heimbürger, *Der Erwerb der Gebietshheit*, Karlsruhe, 1888.]

Occupier.—The word signifies, as a general rule, the person in actual possession of premises, whether owner or not, but it has been interpreted in some cases in special senses. Thus anyone driving his own cattle along a road by a railway, or allowing them to be there, is entitled to protection as an "occupier" of adjoining land, under sec. 68 of the Railways Clauses Act, 1845, 8 & 9 Vict. c. 20 (*M. S. & L. Rwy. Co. v. Wallis*, 1854, 14 C. B. 213; *Charman v. S. E. Rwy. Co.*, 1888, 21 Q. B. D. 524), but not if his cattle are straying or are driven there without his consent. And occupiers of houses in the nature of almshouses, having a tenure terminable only on the commission of murder or felony or the like, have been held entitled to the parliamentary franchise as "owners" (*Fryer v. Bodenham*, 1867, L. R. 4 C. P. 529), but not if they are members of a corporation (*Durant v. Kennett*, 1869, *ibid.*, vol. v. 262).

See also ALMSHOUSES; FRANCHISE (ELECTORAL); POOR LAW; RATING; GAME LAWS.

Occupier's Liability.—As to rates, see BENEFICIAL OCCUPATION; RATING. As to use and occupation, see LANDLORD AND TENANT. See further NEGLIGENCE; NUISANCE.

Octroi is the French name of the local duty levied upon goods entering a town or district, as distinguished from *douane* or customs duties, which are those levied at the frontier.

Offence.—This term has no technical sense in English law, and is applicable to any act or omission which is punishable on indictment, or criminal information, or summarily by justices. See **CONTRAVENTION**; **FELONY**; **MISDEMEANOUR**; **TREASON**. When in a statute an act or omission is declared to be an offence, it is thereby made criminal and a misdemeanour, unless described as **TREASON** or **FELONY**.

Offences against the Person.—Under this head, in the Offences against the Person Act, 1861, are collected a large number of crimes, thus divided by the Legislature:—

Homicide and attempts to murder (ss. 1–15). See **MANSLAUGHTER**; **MURDER**.

Letters threatening to murder (s. 16). See **MENACES**.

Acts causing or tending to cause danger to life or bodily harm (ss. 17–35). See **BODILY HARM**; **EXPLOSIVES**; **POISON**; **FIREARMS**.

Assaults (ss. 36–47). See **ASSAULT**; **BATTERY**; **BODILY HARM**.

Rape, abduction, and defilement of women (ss. 48–55). See **ABDUCTION**; **RAPE**.

Child-stealing (s. 56). See **KIDNAPPING**.

Bigamy (s. 57). See **BIGAMY**.

Attempts to procure abortion (ss. 58, 59). See **ABORTION**.

Concealing the birth of a child (s. 60). See **BIRTH, CONCEALMENT OF**.

Unnatural offences (ss. 60, 61). See **ABOMINABLE CRIME**.

Making explosives to commit felonies against the Act (s. 64). See **EXPLOSIVES**.

The classification of the offences and the structure of the Act is somewhat crude and empirical; but the crimes dealt with have certain common elements, since they consist in violation of rights with respect to human life, and to chastity, and freedom of citizens from imprisonment or bodily injury. The offences are dealt with under the heads above indicated.

The Act of 1861 contains numerous provisions as to procedure, supplemented by a few other enactments which may be thus summarised:—

Offences committed in the Admiralty jurisdiction are triable in any county or borough in England in which the accused is arrested or is in custody (1861, c. 100, s. 68). Special provisions are made by the Army Act and the Naval Discipline Act for the trial of offences committed by persons subject to military law or naval discipline. Accessories before and after the fact are subject to the same rules as accessories to other offences, whether punishable on indictment or summary conviction (1861, c. 94, ss. 3, 4; c. 100, s. 67; 11 & 12 Vict. c. 43, s. 5).

Power is given to constables to arrest any person found lying or loitering on any highway, yard, or other place during the night, or who is suspected of having committed, or being about to commit, any felony under the Act (1851, c. 19, s. 11; 1861, c. 100, s. 66), and to issue and execute search warrants for explosives manufactured for the commission of any such felony (s. 65).

In a trial for felonious cutting, stabbing, or wounding, the jury may convict of the misdemeanour of unlawful wounding (14 & 15 Vict. c. 19, s. 5).

The costs of prosecutions for indictable offences under the Act of 1861 are defrayed out of the local rate (1861, c. 100, s. 77), subject to the power, in the case of felonies and assaults, to order the offender to pay them (1870, c. 23; 1861, c. 100, ss. 74, 75).

In the case of certain offences against children under sixteen, the accused, and his or her husband or wife, are competent but not compellable witnesses, and children who are too young to understand the nature of an oath can give their evidence unsworn. See *CRUELTY to Children*.

Offensive Trades.—The subject of NUISANCE as a whole has been dealt with in a separate article (*ante*, p. 228). Certain businesses are from their nature specially liable to cause nuisances, unless special precautions are taken as to the locality where they are carried on and the manner in which they are conducted. With reference to some of these Parliament has at different times passed special enactments, with the object of reducing as far as possible the risk and annoyance to the public of which they might otherwise be productive. Some of these enactments have already been considered. See ALKALI WORKS, vol. i. 221; CHEMICAL PROCESS, vol. ii. p. 497.

Others which are defined as being offensive trades were dealt with under the original Public Health Act, 1848, and now are regulated by the Act of 1875, ss. 112–116, and by the London Act, 1891, ss. 19–22. Certain trades in which animal matter is worked up, and which from their nature are very liable to produce offensive smells, may not be newly established in an urban district without the consent in writing of the sanitary authority. The trades enumerated in the general Act are now those of blood boiler, bone boiler, fellmonger, soap boiler, tallow melter, tripe boiler, and any other noxious or offensive trade, business, or manufacture of the same class, *i.e.* in which organic substances are dealt with so as to be liable to cause a nuisance. Thus a man who established the business of a bone dealer has been held to come within this prohibition (*Passey v. Oxford Board*, 1879, 43 J. P. 622); but the trade of brick-making does not (*Wanstead Board v. Hill*, 1863, 13 C. B. N. S. 479); nor can the establishment of a hospital for the treatment of infectious cases be prohibited under these sections (*Withington Board v. Manchester (Mayor of)*, [1893] 2 Ch. 19). In London the specified trades are not quite the same, *vide infra*.

These trades are not of themselves unlawful if carried on in a proper manner and established in a proper place (*Pinckney v. Ervens*, 1871, 4 L. T. 741), and may still be newly established in rural districts. If they are carried on so as to cause a public nuisance, they are of course liable to be stopped by injunction or indictment, wherever they may be situated and however old they may be; and the licence of the urban authority would be no answer to such a complaint. In case of trades carried on long enough to have gained a prescriptive right to cause private nuisances, individuals aggrieved can still maintain an action, if they can show that the original nuisance has become aggravated (*R. v. Watts*, 1829, Moo. & M. 281); but, if they cannot do this, must put up with the inconvenience. The special statutory provisions as to offensive trades are for the protection of the public. But individuals aggrieved may sometimes put them into operation and so protect themselves.

Urban authorities may from time to time make by-laws in order to prevent or diminish the noxious or injurious effects of any offensive trades established with their consent since the first Act of 1848. These by-laws

must, of course, conform to the general rules applicable to such matters. Trades established before 1848, and trades not coming within the category of offensive trades, which require consent before they may be newly established, can only be dealt with by the ordinary laws as to nuisances. It is, however, further provided that in the case of factories, buildings, or places used for any trade, business, process, or manufacture causing effluvia, which are certified by the medical officer of health or by any two qualified medical practitioners or by ten inhabitants of the district to be a nuisance or injurious to health, the urban authority *shall* cause legal proceedings to be instituted before a Court of summary jurisdiction or a superior Court against the person offending. If the proceedings are before justices, the minimum penalty they can impose is 40s.; and on each subsequent conviction must be double that previously imposed, until it reaches £200 (s. 114). The urban authority may institute proceedings in respect of matters alleged in the certificate where the premises certified to be a nuisance are outside their district, as well as where they are within it (s. 115).

In London the businesses of blood boiler, bone boiler, manure manufacturer, tallow melter, and knacker may not be established anew at all; those of fellmonger, tripe boiler, slaughterer of cattle or horses for food, and any others duly declared to be offensive businesses, may not be established anew without the sanction of the County Council; to the latter category must be added the business of soap boiler if carried on in the specified way, otherwise it is absolutely prohibited (54 & 55 Vict. c. 76, s. 19). Any premises used as a slaughter-house, knackers' yard, cow-house or place for keeping cows, must be licensed by the County Council, and the licence must be renewed annually (s. 20). If any manufactory, building, or premises used for any trade, business, process, or manufacture causing effluvia is certified to be a nuisance or injurious or dangerous to the health of any of the inhabitants of the district, the sanitary authority must make complaint. If the petty sessional Court considers that the business carried on by the person complained of is a nuisance or causes any effluvia which is a nuisance or injurious or dangerous to the health of any of the inhabitants, then, unless it is shown that such person has used the best practicable means for abating the nuisance or preventing or counteracting the effluvia, he is liable to a penalty not exceeding £50. The minimum and progressive penalties provided by the corresponding sec. 114 of the Public Health Act are not reproduced here. Among the businesses which may be dealt with under the above section are included the removal by a sanitary authority of house and street refuse. If they are the offenders, complaint may be made and proceedings instituted by the County Council (s. 22).

Offer.—See CONTRACT.

Offerings, Oblations, and Obventions are one and the same thing, though *obventions* is the largest word. *Oblations* generally mean anything offered to the Church by the pious and faithful. Under these terms are comprehended not only those small customary sums paid by a person when he receives the Sacrament at Christmas, Easter, and Whitsuntide, but also those customarily paid at marriages, christenings, churchings, and burials. Such offerings once constituted the chief revenues of the Church, and, although voluntary at first, the same when once established by custom became recoverable as small tithes.

Offerings at the four principal feasts—Christmas, Easter, Whitsun (oblations at this time are called Pentecostals or Whitsun-farthings), and the dedication of the Church—are expressly provided for (1548) by sec. 10 of 2 & 3 Edw. VI. c. 13. This statute was repealed (1887) by 50 & 51 Vict. c. 59, “except as to tithes, offerings, and duties which have not been commuted or are otherwise still payable.”

Easter offerings are, as directed by the rubric at the end of the Communion Office, to be paid by every parishioner to the parson, vicar, or curate, or his or their deputy, at Easter, and such offerings are “all ecclesiastical duties accustomed due then and at that time to be paid.” These were considered by Dr. Gibson (Gibbs. *Cod.* 703) to be partly such duties and oblations as were not immediately annexed to any of the forementioned offices, and partly a composition for the holy loaf which the communicants were to bring and offer, and which is therefore to be answered at Easter, because at that festival every person was indispensably bound to communicate.

(1545) In the city of London and liberties of the same, by 37 Hen. VIII. c. 12, s. 11, every householder paying 10s. rent and above is discharged of offerings, but his wife and children or others taking of the rites of the Church at Easter shall pay 2d. for the four offering days each year. It has been decreed (1724) that *Easter offerings* are due of common right, and not by custom only, at 2d. per head, unless it had been customary to pay more (*Lawrence v. Jones*, Bunb. p. 173), and the learned reporter of that case queried whether he only who exercises the spiritual function is entitled to the offerings and not the lay impropiator.

Gilbert, C.B. (1725), said that offerings were a compensation for personal tithes, and the Court ordered that the defendant do come to an account with the plaintiff (a rector who claimed Easter offerings) for tithes of wool, calves, lambs, etc. (*Egerton v. Still*, 2 Wood, 251).

The whole Court (1749) were (in *Carthew v. Edwards*, 2 Wood, 71) unanimously of the opinion that Easter offerings are due of common right, and had been so held ever since the early case of *Lawrence v. Jones* (*ubi supra*), for before that the law was that offerings and oblations were of two sorts—voluntary and consuete.

R. v. Hall, 1866, L. R. 1 Q. B. 632, decided (1) that terriers (*i.e.* registers or surveys) of glebe lands and other rights belonging to a parish from 1727 to 1825 and containing the following clause: “Easter offerings. Every communicant, 2d.; every cow, 2d.; every plough, 2d.” etc., showed evidence of a custom that excluded the common law right (if such existed) to a payment of 2d. for every member of a family of the age of sixteen as an Easter offering, because it included items to which the common law did not extend; (2) that the word “communicant” did not override the whole clause, but that each item was an independent charge and payable by every parishioner, whether he came within the denomination of a communicant or not; (3) that in the absence of evidence to the contrary, “communicant” meant only those actually attendant at the communion; (4) that the custom attached to any house as soon as built and occupied, and was not only confined to ancient houses which were in existence when the terriers were made. It appears from the foregoing that offerings, oblations and obventions have been considered to be small tithes, but whether recoverable at common law is open to doubt, although the earlier authorities support the affirmative, and numerous authorities show them to be recoverable by custom. And see the judgment of Blackburn, J., in *R. v. Hall*, *supra*; and TITHES.

Offertory.—This was anciently an oblation for the use of the priest, but at the Reformation was changed into alms for the poor. Alms collected at the offertory, whether in churches or chapels, are by direction of the RUBRIC at the disposal of the incumbent and churchwardens (*Moysey v. Hillcoat*, 1828, 2 Hag. Con. 30, deals with a case of a proprietary chapel).

In the rubric in the Communion Service (1548) of 2 Edw. VI. it was ordained that—

Where there be clearkes they shall syng according to the length and shortness of the tyme that the people be offering. In the mean tyme, whyles the clearkes do syng the offertory, so many as are disposed shall offer unto the poore mennes boxe, everyone according to his habilitie and charitable mynde.

(1551) 5 Edw. VI.—

Then shall the churchwardens, or some others by them appointed, gather the devotion of the people and put the same into the poore men's boxe; and upon the offering days appointed, every man and woman shall pay to his curate the due and accustomed offerings.

(See OFFERINGS.)

And by the present rubric (1661), 13 & 14 Car. II.—

Whilst the sentences of the offertory are in reading, the deacons, churchwardens, or other fit persons appointed for that purpose shall receive the alms for the poor, and other devotions of the people, in a decent basin to be provided by the parish for that purpose, and reverently bring it to the priest, who shall humbly present and place it upon the holy table.

A later rubric enacts that after divine service is ended—

The money given at the offertory shall be disposed of to such pious and charitable uses as the minister and churchwardens shall think fit. Wherein, if they disagree, it shall be disposed of as the ordinary shall appoint.

(1536) By 27 Hen. VIII. it was enacted that the money collected for the poor should be kept in the common coffer or box standing in every church; and by a canon (1603), the churchwardens were to provide a strong chest, with a hole in the upper part thereof, to be provided at the charge of the parish with three keys, one to be in the custody of the parson, vicar, or curate, the others in the custody of the churchwardens for the time being—which chest they shall set and fasten in the most convenient place, for the purpose of the parishioners putting into it their alms for their poor neighbours; that the parson, vicar, or curate shall exhort their neighbours to help the poor and needy, etc.; that the alms shall yearly or oftener be taken out and distributed, the same in the presence of most of the parish, or six of the chief of them, to be truly and faithfully delivered to their most poor and needy neighbours.

Office Copy.—An office copy of a document is one which is made by a proper officer of the Court in which the original of such document is filed. The following definition is that given in a leading work on evidence: "By an office copy is meant a copy authenticated by a person intrusted with the power of furnishing copies. It is admitted in evidence upon the credit of the officer without proof that it has been actually examined, and it has ever been regarded even at common law when tendered in evidence in the same Court, and in the same cause, as equivalent to the record itself" (Taylor on *Evidence*, 9th ed., 1895, p. 1015; see *Denn v. Fulford*, 1761, 2

Burr. 1177; *Jack d. Boyle v. Kiernan*, 1840, 2 Jebb. & S. 231). In modern practice, office copies of all writs, records, pleadings, and documents filed in the High Court of Justice are admissible in evidence in all causes and matters, and between all persons or parties, to the same extent as the original would be admissible (R. S. C. 1883, Order 37, r. 4).

All copies appearing to be sealed with a seal of the Central Office are to be presumed to be office copies issued from the Central Office, and, if duly stamped, may be received in evidence, and no signature or other formality, except the sealing with a seal of the Central Office, is required for the authentication of any such copy (Order 61, r. 7).

An office copy of an affidavit may in all cases be used, the original affidavit having been previously filed, and the copy duly authenticated with the seal of the office (Order 38, r. 15).

In the Chancery Division claimants filing affidavits are not required to take office copies, but the person who examines the claim takes such office copies and produces them at the hearing (Order 55, r. 48); but, with that exception, the party by or on whose behalf any affidavit, deposition, or certificate is filed must leave a copy with the officer with whom it is filed, who examines it with the original, and marks it as an office copy (Order 66, r. 7 (f)).

Where, according to the practice, an original affidavit can be used, it is not necessary to take an office copy; nor need an office copy be taken of an affidavit of discovery of documents, but the copy delivered by the party filing it may be used against such party (Order 65, r. 27 (53) (54)).

Certificates of Acknowledgment.—By the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), an index is required to be kept in the proper office of the Supreme Court to all certificates of acknowledgments of deeds by married women lodged therein; and an office copy of any such certificate is to be delivered to any person applying for the same; and every such office copy is receivable as evidence of the acknowledgment of the deed to which such certificate refers (s. 7 (7) (8)).

Bills of Sale.—Under the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 16, any person is entitled to have an office copy or extract of any registered bill of sale and affidavit of execution filed therewith, and any copy of a registered bill of sale and affidavit purporting to be an office copy thereof, is in all Courts, and before all arbitrators or other persons, to be admitted as *prima facie* evidence thereof, and of the fact and date of registration as shown thereon.

Office (Inquest of).—“Proceedings under an *inquisition* or *inquest of office*, or an *office*, as it is termed in the old books, is a peculiar prerogative remedy for the benefit of the Crown.” “It is an inquiry made, through the medium of an indefinite number of jurors summoned by the sheriff, by the king’s officer, his sheriff, coroner (see now *ante*, vol. iii. p. 414), or escheator (now an obsolete officer), *virtute officii*, or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels” (Chitty on the *Prerogative of the Crown*, p. 246; see also Stephen’s *Blackstone*, vol. iii. p. 683).

Inquests of office in modern times are now of very rare occurrence, and are practically confined to cases of the escheat of real estate, especially since the provision made by the Act for the regulation of procedure in Crown suits (the Queen’s Remembrancer Act, 22 & 23 Vict. c. 21), that,

where any right of re-entry upon lands or other hereditaments shall have accrued to the Crown, it may be exercised without office found (s. 25). The remedy for any claimant aggrieved by an inquisition was by a traverse, or by taking proceedings to quash it. The Lord Chancellor had power under his common law jurisdiction to grant leave to traverse, or to quash an inquisition finding the title of the Crown upon a supposed escheat (*In re Ann Parry*, 1866, L. R. 2 Eq. 95; *In re Kane*, 1852, *ibid. n.* These are the only recent reported cases on the subject). A simpler remedy than that by a traverse was introduced in some cases by the Crown Suits Act, 1852. The Act provided that wherever the title of the Crown or of the Duchy of Cornwall to any real estate is found by inquisition, anyone on whom a copy of the inquisition has been served, and who is aggrieved by any description of boundaries, or other finding in the inquisition, may file in Court a statement of his objection to it. Upon this a person may be appointed to hold an inquiry into the matter, and the inquisition amended, if necessary, so as to accord with his return (s. 52).

The Escheat Procedure Act, 1887, empowered the Lord Chancellor to make rules for the holding of inquiries as to title to real estate of the Crown or the Duchy of Cornwall by escheat, or any inquest of office not otherwise regulated by law, and a number of rules have been made (these are printed in the Appendix to Short and Mellor's *Crown Practice*). The Act provides that every person aggrieved shall be at liberty to traverse the inquisition (s. 2), and that an inquisition is not to prejudice any rights which, at the time of the death of the person whose death led to the inquisition, were vested in some other person. See ESCHEAT; and as to inquisitions in lunacy, see LUNACY.

[*Authorities.*—Viner's *Abr.* "Office or Inquisition"; Chitty on the *Prerogative*, pp. 246 *et seq.*; Short and Mellor's *Crown Practice*.]

Office of Profit.—It was provided by sec. 3 of the Act of Settlement (12 & 13 Will. III. c. 2) that no person having an office or place of profit under the Crown should be capable of serving as a member of the House of Commons. This sweeping provision was, however, repealed in the following reign, and the Act of 6 Anne, c. 41, contains the groundwork of the present law on the subject.

Sec. 24 of the Act of Anne provided that no person having any new office or place of profit under the Crown created or erected since October 25, 1705, should be capable of being elected, or of sitting or voting, as a member of the House of Commons, and also similarly disqualified colonial governors and deputy-governors, and certain other officers enumerated in the section. The holders of various offices have been excepted from the operation of this section by subsequent statutes—the Land Tax Commissioners, by 42 Geo. III. c. 116, s. 185; the Vice-President of the Board of Trade, by 57 Geo. III. c. 66; the Paymaster-General, by 5 & 6 Will. IV. c. 35, s. 5; the Postmaster-General, by 29 & 30 Vict. c. 55; the President and one of the secretaries of the Local Government Board, by 34 & 35 Vict. c. 70, s. 4; and certain others (see Rogers on *Elections*, vol. ii. pp. 8–18)—but, except so far as it has been removed by subsequent Acts, the disqualification imposed by the section still exists. As to the Secretaries of State and their Under-Secretaries, see 21 & 22 Vict. c. 106, s. 4; 27 & 28 Vict. c. 34. Members of the Council of India are disqualified by 21 & 22 Vict. c. 106, s. 12.

Sec. 25 of the Act of Anne provides that if any member of the House of Commons accepts any office of profit under the Crown (this means any

office to which sec. 24 does not apply) during the time he continues to be a member, his election shall be void, and a new writ shall be issued for a new election; but such person shall be capable of being re-elected. This section does not apply to any officer in the army or navy, where he accepts any new or other commission in the army or navy respectively (s. 27); nor does it now apply to the acceptance by a member of a commission as an officer in the militia (45 & 46 Vict. c. 49, s. 38). And the Reform Act, 1867 (30 & 31 Vict. c. 102), s. 52, in order to avoid the inconvenience of a re-election whenever a minister is transferred from one department to another, provides that where a member has been elected since the acceptance of any office described in the Schedule H. to the Act, the subsequent acceptance by him of any other office or offices described in such schedule in lieu thereof shall not vacate his seat. The offices described in the schedule include those of the Secretaries of State, the First Lord of the Treasury, the Chancellor of the Exchequer, the President of the Privy Council, the Paymaster-General, the Postmaster-General, the Attorney-General and Solicitor-General, and several others; and the President of the Board of Agriculture is added by the Board of Agriculture Act, 1889, s. 8.

The acceptance of some nominal office under the Crown is often resorted to by members of the House of Commons as a means of evading the constitutional principle that a member, once duly elected, cannot relinquish his seat. The offices usually chosen for this purpose are the stewardship of the CHILTERN HUNDREDS, or of the manor of East Hendred, or the manor of Northstead or Hempholme; and although such offices are in reality merely nominal, the warrants grant them "together with all wages, allowances, etc.," and they thus assume the form of places of profit. One of these offices will usually be granted to any member desiring to resign, and the acceptance thereof immediately vacates his seat, in accordance with the provisions of sec. 25 of the Act of Anne; and when the office is required for some other member wishing to resign, the appointment is revoked (*May's Parliamentary Practice*, p. 603).

[*Authorities*.—*May's Parliamentary Practice*, pp. 596–612; Rogers on *Elections*, vol. ii. pp. 8–18, where the various offices which have been decided to be offices of profit are enumerated.]

Office; Public Officer.

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Definitions.—An office is defined (*Cruise, Dig.*) as a right to exercise a public or private employment, and to take the fees and emoluments belonging to it. The position of an officer appears to involve some discretionary authority, and is to be distinguished from that of a mere servant whose only duty is to obey orders, though it is not always easy to draw the line. This article is limited to public offices, that is to say, such as involve some duty to the public.

The Crown is said to be the fountain of office, but many offices have been created or regulated by statutory authority. Offices are held either immediately under the Crown or of some subordinate authority. Offices

are also divided into ancient and new. It was early established that the Crown could not make any change in the manner of appointing to or in other incidents of, ancient offices. So the Crown cannot appoint to an office when the right of appointing is incident to some other officer. Thus the officers of the Court of Queen's Bench were formerly appointed by the Chief Justice. As to the principles governing the appointment of officers in Courts of justice, when not regulated by statute, see *Harding v. Pollock* (1829, 2 St. Tr. N. S. 342). The abuses and sinecures which grew up under this principle have now been removed by statute in many cases. It is also said that the Crown cannot create new offices with fees, or grant new fees to ancient offices, without the consent of Parliament, for that would be to put a tax upon the subject. On the other hand, power in the Crown to dismiss an officer at pleasure does not imply power to reduce the fees of the office (*Cameron v. Kyle*, 1835, 3 St. Tri. N. S. at p. 620).

Another division of offices is into judicial and ministerial. It is laid down that the former cannot be exercised by deputy, unless there be express authority. Nor could they be assigned or granted for a term of years (*Reynel's case*, 9 Rep. 95), or in reversion. The same officer may be called to perform both judicial and ministerial acts, and will be civilly liable for neglect or failure to perform the ministerial but not the judicial acts (*Ferguson v. Kinnoull*, 1842, 9 Cl. & Fin. 251; 4 St. Tri. N. S. 785).

Manner of Appointment.—Offices under the Crown are granted either by delivery of the symbols of office, as in the case of the Chancellor and the Secretary of State; or by patent, as in the case of the judges; or by warrant or commission under the sign manual, as in the case of colonial governors, or in the manner prescribed by statute in the particular case.

With regard to other offices, it is said generally that offices lie in grant, and cannot be granted or transferred without a deed, but see *M'Mahon v. Lennard*, 1858, 6 H. L. 970; and acting in an office is evidence of due appointment (*Doe de Hoply v. Young*, 1845, 8 Q. B. 63; *R. v. Murphy*, 1827, 8 Car. & P. 297).

Tenure.—The offices of Earl Marshal and Great Chamberlain are hereditary; and ministerial, but not judicial, offices might also be granted for terms of years, or in reversion; but most offices are granted either during good behaviour or at pleasure. A grant during good behaviour is a grant for life, and an express grant for life is subject to the condition of good behaviour. The judges of the Supreme Court hold office during good behaviour, subject to the power of the Crown to remove them upon an address from both Houses of Parliament. They are said by Anson to hold of the Crown during good behaviour, and as regards Parliament at pleasure (see PARLIAMENT). Generally officers and servants of the Crown hold office during pleasure (*In re Tufnell*, 1876, 3 Ch. D. 174; *Shenton v. Smith*, [1895] App. Cas. 229; *Dunn v. R.*, [1896] 1 Q. B. 116).

Other officers, in the absence of express regulation, appear to hold during good behaviour (*Dighton's case*, 1 Vent. 82).

Effect of Demise of the Crown.—See DEMISE OF THE CROWN.

Motion and Suspension.—Officers holding during good behaviour can only be removed for misbehaviour in the office, that is to say "misconduct in the performance of official duties, refusal or deliberate neglect to attend to them, or, it would seem, conviction for such an offence as would make the convicted person unfit to hold a public office" (Anson, vol. ii. p. 214; *R. v. Richardson*, 1 Burr. 539). Such offices, when constituted by letters-patent, which are matter of record, can only be vacated by

scire facias (*q.v.*). It is said, however, that the Crown may suspend an officer holding for life by patent, but cannot deprive him of the emoluments of his office (*Slingsby's* case, 1680, 3 Swans. 178; *Phillips v. Bury*, 1788, 2 T. R. 351).

In the case of officers not holding by patent, it would seem that they may be dismissed for misbehaviour, and left to pursue their remedy (see below); but they must at least have notice of the charge (*R. v. Saddlers' Company*, [1863] 10 H. L. 404; *Willis v. Gipps*, [1846] 6 St. Tr. N. S. 315 n.).

Offices held during pleasure are vacated by dismissal, or the appointment of a successor (*Smyth v. Lathom*, [1833] 9 Bing. 692; *Hill v. R.*, [1854] 8 Moo. P. C. 138).

As to the amotion of colonial officers under 22 Geo. III., see AMOTION.

Wrongful Disturbance.—An officer wrongfully amoved may proceed—

1. By information in the nature of a *quo warranto* (*q.v.*) against his successor, if the office be a public one, and has been filled up (*Darley v. R.*, 1845, 12 Cl. & Fin. 520; Shortt on *Informations, etc.*, 123).

2. By mandamus (*q.v.*) to restore him against the proper authorities in certain cases, if the office be vacant.

3. By action for money had and received against his successor for the emoluments of the office (*Kennedy v. Greg*, 1845, 8 Ir. L. R. 225).

4. By action of tort against his successor for disturbance (*Lawlor v. Alton*, 1873, 8 Ir. Rep. C. L. 160).

Sale of Offices, Assignment of Salary, etc.—Contracts for the purchase and sale of offices are declared to be void, and the guilty party disabled, by 5 & 6 Edw. VI. c. 16; and 49 Geo. III. c. 126, made it a misdemeanour to enter into such contracts. 38 & 39 Vict. c. 16, enables the Crown to authorise terms as to exchanges in the army (see further, Chitty's *Statutes*, "Office").

Agreements of this kind are also void at common law, as contrary to PUBLIC POLICY (*Hanington v. Du Chastel*, 1782, 1 Bro. C. C. 124; *Blachford v. Preston*, 1799, 8 T. R. 89; *Richardson v. Mellish*, 1824, 2 Bing. 229). As to the offence of taking or offering bribes for appointment to an office, see *R. v. Vaughan*, 1769, 4 Burr. 2494; *R. v. Pollman*, 1809, 2 Camp. 229.

Assignments of salary are also void, as against public policy (*Flarty v. Odlum*, 1790, 3 T. R. 681; *Liverpool Corporation v. Wright*, 1859, 1 Johnson, 359); but there is now power under sec. 53 of the Bankruptcy Act to appropriate a portion of pay or salary to creditors.

Criminal Liability.—Refusal to serve in an office when required to do so is in many cases an indictable misdemeanour (Chitty, *Prerog.* 19). Corruption, extortion (*q.v.*), or oppression in the exercise, or under colour, of an office, and frauds and breaches of trust affecting the public, and neglect of official duty, are punishable by indictment or information (*q.v.*), and may be visited with loss of office, as well as with fine or imprisonment (see Stephen, *Dig. Cr. Law*, c. xi.). As to offences committed by officers abroad and triable here, see VENUE. As to the civil liability of servants of the Crown, see EXECUTIVE GOVERNMENT; PUBLIC AUTHORITIES ACT.

[*Authorities.*—See generally, Bacon, *Abr.* tit. "Office"; Cruise, *Dig.* tit. "Office"; Chitty's *Prerogative.*]

Officers, Military and Naval.—The military and naval forces are commanded by various classes of officers (*e.g.* COMMANDER-IN-CHIEF, ADMIRAL, Colonel, Major, etc.), appointed directly or indirectly by

the Crown in virtue of its prerogative. Unless controlled or regulated by Parliament, the officering of all branches of the force is in the Crown's discretion and authority. Thus aliens (*q.v.*) cannot hold command; and by the Army Act, 1881 (44 & 45 Vict. c. 58, s. 95), though aliens can be enlisted in a certain proportion, such aliens cannot hold any higher rank than that of a warrant officer or non-commissioned officer. No disqualification now exists in the case of British subjects. There is no legislative restriction placed upon the sovereign appointing infants or civilians, or appointing a person to one military rank who has not previously filled one of inferior grade.

Officers of both the military and naval services are either commissioned by the Crown (see COMMISSION) or warrant officers appointed by the War Department or Admiralty respectively; or non-commissioned officers (in the army) who are appointed, according to the long custom of the service, by the colonel commanding each regiment. Petty officers in the navy are appointed by the captain of the vessel.

The various ranks and grades for military purposes are created by the Crown, and the qualifications, pay, and other terms upon which officers are appointed, employed, continued in the service, or discharged therefrom, are regulated by the Crown in Regulations and Army Orders and Warrants, or Admiralty Regulations at its discretion, so far as not otherwise provided by statute. The exercise of power under military law as exercised by each rank, and the powers it has in the administration of that law, by courts-martial and otherwise, are given by the Acts relating to the government of the military and naval forces; and the exercise of such authority can only be justified where the power has been properly conferred by the Crown (see articles ARMY; COMMISSION; COURTS-MARTIAL; NAVY; MILITARY LAW). By sec. 163 (1) (*d*) of the Army Act, an army list or gazette purporting to be published by authority, and either to be printed by a Government printer, or to be issued, if in the United Kingdom, by Her Majesty's Stationery Office, and if in India, by some officer under the Governor-General of India, is evidence of the rank and status of the officers therein mentioned, and of any appointment held by such officers, and of the corps or battalion, or arm or branch of the service, to which such officers belong. Officers holding commissions hold them upon terms as to retirement, etc., laid down in the regulations. The regulations provide for placing them on half-pay at certain ages, or, in certain cases, as a non-effective allowance; but an officer has no absolute right to be placed on the half-pay list, or to remain there (see PAY AND PENSIONS, MILITARY AND NAVAL). Half-pay officers, as such, are not subject to the provisions of the Army Act, but they retain their rank, and in case they are called upon to render military service they are entitled to compel obedience to their orders. The persons subject as officers thereto, as distinct from soldiers, are officers commissioned or in pay, as officers, in any branch of the forces; also persons who, by virtue of their commissions, are appointed to any department or corps of the forces, or of any arm, branch, or part thereof; and also persons who, whether retired or not, are, by virtue of their commission or otherwise, legally entitled to the style and rank of an officer of the forces, *i.e.* when by virtue of employment in military service they become subject to military law (*q.v.*). Warrant officers also, and other officers holding honorary commissions, are officers within the meaning of the Act; but warrant officers not holding such commissions are not officers in the distinctive sense of the Army Act. The latter are included in the expression "soldier"; but provisions are made in their favour as to the infliction of punishments upon them which

do not apply to other soldiers. In the army, warrant officers not holding honorary commissions, and non-commissioned officers, are ranked together, and have the status of soldiers, but compulsory retirement at certain ages for different classes of warrant officers is fixed by the Royal Warrant on Pay, etc. The Secretary of State may, however, retain them, in certain cases beyond the fixed ages (see p. 181, Royal Warrant for Pay, etc., 1897).

In the Navy Discipline Acts (see NAVY) "officer" includes a warrant officer, but does not extend to petty and other non-commissioned officers.

The relative ranks of military and naval officers (commissioned) have been prescribed by Order in Council of 17th February 1866.

By the Officers of Royal Naval Reserve Act, 1863 (26 & 27 Vict. c. 69), the masters, mates, or engineers of ships in the merchant service may be appointed to serve as officers of reserve to the Royal Navy, under regulations laid down by the Admiralty for appointment, promotion, employment, rank, etc. The officers rank with, but after, officers of the Royal Navy. The highest rank, however, under the present regulations is that of lieutenant.

When called out for training or exercise, or on actual service, they are subject to military law.

The Queen's Regulations prescribe as between officers of the same rank in the various branches of the military forces, that officers of the regular forces, and officers of the militia, who take rank with officers of the former as the youngest of their degree, shall have precedence of, and command, the officers of equal degree serving in the Honourable Artillery Company, Yeomanry Cavalry, and Volunteer corps; and the officers of these three branches rank together according to the dates of their commissions.

See ARMY; COLONIAL FORCES; COMMISSION; COURTS-MARTIAL; ENLISTMENT; INDIAN ARMY; MILITIA; MILITARY LAW; NAVY; PAY AND PENSIONS; RESERVE FORCES; VOLUNTEERS; YEOMANRY.

[*Authorities*.—Clode, *Military Forces of the Crown*, vol. ii. ch. xvi.; Prendergrast, *Officers in the Army*; *Manual of Military Law*, War Office, 1894.]

Official.—Pertaining to a public charge. In the civil law, he is the minister of, or attendant upon, a magistrate. In the canon law, he is the person to whom a bishop commits the charge of his spiritual jurisdiction (see OFFICIAL PRINCIPAL). There is one in every diocese, called *officialis principalis*, i.e. chancellor; the rest, if there are more, are *officiales foranei*, i.e. commissaries.

Official Copy.—An exemplification is a copy of a record set out either under the Great Seal or the seal of a Court. An exemplification is proved by its mere production, as the judges take judicial notice of the seal. Exemplifications were used when it was necessary to prove a record in another Court than that to which it belonged. Now that the several superior Courts are divisions of the High Court, exemplifications are no longer used, as office copies are admissible to prove all the records of the Court (see OFFICE COPY; Order 37, r. 4; Taylor on *Evidence*, ss. 1536–1538; EXEMPLIFICATIONS).

Official Liquidators.—See COMPANY.

Official Mark.—The term “mark” includes any printed, embossed, or otherwise impressed stamp, device, or symbol, whether the same consists of a coat of arms or other distinctive device or seal, or merely a name, signature, or letter (see the definitions in the Patents, Designs, and Trade Marks Act, 1888, 51 & 52 Vict. c. 50, s. 10 (1); the Hop (Prevention of Frauds) Act, 1866, 29 & 30 Vict. c. 37, s. 1; and 7 & 8 Vict. (1844) c. 22, s. 14); and by “official mark” is meant any such mark impressed in the course of his duty by one holding an official capacity of any kind. Wherever such official mark appears, there is presumptive evidence of an official act, and an official has no right to use his official mark in his private capacity, as, for example, by way of a trade mark (*Chase v. Mayo*, 1876, 121 Mass. (7 Lathrop) 343).

Crown Acts are evidenced by the GREAT SEAL of the United Kingdom, the PRIVY SEAL, the SIGN MANUAL, the Seals of Scotland, and the Great Seal and Privy Seal of Ireland. As to forgery of, see FORGERY.

By the R. S. C. 1883, Order 61, r. 6, the seals used in the Central Office are to be such as the Lord Chancellor from time to time directs, and the Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 61, provides that in the district registries such seals shall be used as the Lord Chancellor may direct. All writs are to be sealed, and are thereupon deemed to be issued (Order 5, r. 11); and all copies, certificates, and other documents appearing to be sealed with the seal of the Central Office shall be presumed to be office copies, and if duly stamped may be received in evidence, no other formality except the sealing being required for their authentication (Order 61, r. 7). In district registries sealing has a like effect (Judicature Act, 1873, *supra*, s. 61). The fee on sealing is ten shillings (*Court Fees Order*, 1884). So grants of probate, etc., must be certified under seal of the Court, otherwise they are not legal evidence. By the County Courts Act, 1888, 51 & 52 Vict. c. 43, s. 180, every County Court is to have a seal, and all summonses and other process issuing thereout are to be sealed and stamped therewith, such documents being then judicially noticeable and admissible as evidence without further proof; and anyone who forges such seal, or knowingly utters any document with a forged seal, is guilty of felony.

As to parliamentary and municipal elections, see BALLOT.

As to corporations, see CORPORATION; MUNICIPAL CORPORATIONS.

By the Companies Act, 1862, 25 & 26 Vict. c. 89, s. 18, a company under the Act, on registration, becomes a body corporate, having perpetual succession and a *common seal*. On such seal, by sec. 41, is to be included the name of the company in legible characters, under a penalty of £50 (s. 42; and see *Gilbertson v. Fergusson*, 1881, 7 Q. B. D. 562). All certificates of shares (s. 31), and powers of attorney authorising persons abroad to act for the company (s. 55), ought to be under seal; but summonses, notices, orders, or proceedings requiring authentication by the company, may be signed by a director or authorised officer of the company, and need not be under the common seal (s. 64). See also the Companies' Seals Act, 1864, 27 & 28 Vict. c. 19, “an Act to enable joint stock companies carrying on business in foreign countries to have official seals, to be used in such countries,” sec. 41 of which, however, does not state that *all* contracts by such companies shall be under seal. The Charitable Trustees' Incorporation Act, 1872, 35 & 36 Vict. c. 24, sec. 1 of which enables the Charity Commissioners to incorporate charity trustees, enacts that contracts of such charities shall

be good though not under seal (s. 11). Production of a document bearing a company's seal is *prima facie* evidence that the seal has been properly affixed (*D'Arcy v. Tamar Rwy. Co.*, 1867, L. R. 2 Ex. 158; *Royal British Bank v. Turquand*, 1856, 6 El. & Bl. 327), but the contrary may be expressly shown (*Mayor of Staple v. Bank of England*, 1887, 21 Q. B. D. 160; *In re Metropolitan Bank*, 1876, 2 Ch. D. 366; *D'Arcy v. Tamar Rwy. Co.*, *supra*; *Bank of Ireland v. Evans' Charities*, 1855, 5 H. L. 389). And the company may be estopped by acquiescence (*Vagliano v. Bank of England*, [1891] App. Cas. 107, 115).

Hall marks on gold and silver plate form an important class of official marks. See PLATE.

WEIGHTS AND MEASURES, and all weighing instruments used for trade purposes, must be verified and stamped by an inspector with a stamp of verification (Weights and Measures Acts, 1878, 41 & 42 Vict. c. 49, s. 29, and 1889, 52 & 53 Vict. c. 21, s. 1 (1)).

When a design (see DESIGNS) is registered under the Patents, Designs, and Trade Marks Act, 1883, 46 & 47 Vict. c. 57, the proprietor must, before delivery on sale of any articles to which it applies, have them marked with the prescribed mark or words denoting that the design is registered, under penalty of losing the copyright in the design (s. 51).

As to customs marks, the Revenue Act, 1883, 46 & 47 Vict. c. 55, s. 7, enacts that if a customs officer has placed a mark on goods passed, and anyone afterwards wilfully alters or obliterates it, the master of the ship shall be liable to a fine of £20.

Marks are also required by statute in some other cases, as under the Merchandise Marks Act, 1887, the Margarine Act, 1887, and in the case of hops, cutlery, metal buttons, linen, etc.; but in these instances the marks are not fixed by anyone in an official capacity.

Official Misconduct.—The chief forms of official misconduct will be found dealt with under such heads as AMOTION; EXACTION; EXTORTION; OFFICE.

Official Principal.—This ecclesiastical office is now, together with that of VICAR-GENERAL, included in the office of chancellor of a diocese; its proper work being to hear causes between party and party (formerly having jurisdiction over wills, legacies, marriages, and the like), and from it a chancellor derives his judicial power in ecclesiastical matters. Archbishops as well as bishops have their official principals; and the Dean of the Arches is the official principal of the Court of the Arches of Canterbury, and as such has original jurisdiction under the PUBLIC WORSHIP REGULATION ACT, 1874 (*q.v.*), and also appellate jurisdiction from the chancellors, commissioners, and officials of the bishops, deans and chapters, and archdeacons in the province of Canterbury; and the chancellor of the Chancery Court of York has similar power in the province of York. Some deans and chapters still preserve their "officials," who were formerly judges exercising in a great measure episcopal jurisdiction, as legal advisers and assessors of the chapter, and exercising some small jurisdiction with regard to the fabric and interior arrangements of the cathedral. Some archdeacons also retain their "officials," who exercise ecclesiastical jurisdiction within such archdeaconries. See ARCHDEACON; DEAN AND CHAPTER.

[*Authority.*—Phillimore, *Eccl. Law*, 2nd ed.]

Official Receivers.—See BANKRUPTCY.

Official Referees are permanent officers of the Supreme Court, created by the Judicature Act, 1873 (s. 83). Their duty is to try such questions and actions as may be referred to them under the provisions of that or any subsequent Act or of any rule of Court. There are at present three official referees, who are each paid a salary of £1500 a year. Their offices are in Portugal Street, W.C.; but they perform their duties either in London or in the country, as they may from time to time be directed or may deem most convenient; and the Treasury pays all proper and reasonable travelling expenses incurred by them in the discharge of their duties.

The work of an official referee may be roughly grouped under three heads:—

1. References for trial under sec. 14 of the Arbitration Act, 1889.
2. References for inquiry and report under sec. 13 of that Act.
3. The assessment of damages under Order 36, r. 57 *a*.

An appeal lies against the order of the Court or a judge under either sec. 13 or 14 of the Arbitration Act, 1889, and it may be reversed if the Court of Appeal thinks that the discretionary power was wrongly exercised (*Case v. Willis*, 1892, 8 T. L. R. 610). If the parties agree on a particular referee, they may have his name inserted in the order of reference, otherwise the business is distributed to the official referees in rotation (Order 36, r. 45). But the Lord Chancellor and the Lord Chief Justice of England have each power to order the transfer of any causes and matters from one official referee to another, if the state of pending business renders such a transfer expedient (*ibid.*, r. 47 *b*).

1. REFERENCES FOR TRIAL.

In any cause or matter (other than a criminal proceeding by the Crown) the Court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before an official referee—

- (a) if all the parties interested who are not under disability consent; or,
- (b) if the cause or matter requires any prolonged examination of documents (see *Ormerod v. Todmorden Mill Co.*, 1882, 8 Q. B. D. 664), or any scientific or local investigation (see *Hamilton v. Merchants' Marine Insurance Co.*, 1889, 58 L. J. Q. B. 544), which cannot in the opinion of the Court or a judge conveniently be made before a jury or conducted by the Court through its other ordinary officers; or,
- (c) if the question in dispute consists wholly or in part of matters of account (Arbitration Act, 1889, s. 14).

If any substantial portion of the matter in dispute in an action is a question of account which cannot be conveniently tried in the ordinary way, the Court or a judge has power to refer the whole action to an official referee (*Ward v. Pilley*, 1880, 5 Q. B. D. 427; *Knight v. Coales*, 1887, 19 Q. B. D. 296); and this is so, even though in certain events it might become unnecessary to determine the matter of account (*Hurlbatt v. Barnett & Co.*, [1893] 1 Q. B. 77; the decision in *Weed v. Ward*, 1889, 40 Ch. D. 555, is no longer law).

An order under sec. 14 of the Arbitration Act, 1889, can only be made in "a cause or matter" (*i.e.* in some pending litigation), and should be strictly confined to questions arising in that cause or matter. If by consent it includes questions which are outside the cause or matter, it owes its validity

to the consent of the parties only, and not to any statutory authority; and an award made under it is therefore final, and cannot be reviewed by the Court (*Darlington Wagon Co. v. Harding, etc., Co.*, [1891] 1 Q. B. 245).

An official referee, to whom any action has been referred for trial under sec. 14 of the Arbitration Act, 1889, has full power to deal with any interlocutory application affecting the conduct of such reference, such as an application for amendment of pleadings, or particulars, or discovery, or a commission to examine a witness abroad; but an appeal lies from his decision to the judge at chambers (*Hayward v. Mutual Reserve Association*, [1891] 2 Q. B. 236; *Macalpine & Co. v. Calder & Co.*, [1893] 1 Q. B. 545). An official referee sits for the same hours in term time as a judge of the High Court, though he may, if he wishes, sit also in vacation (Order 63, r. 16). The proceedings before him are conducted in the same manner as a trial before a judge; but he has no power of committal or attachment (Order 36, rr. 49, 51, 52 *a*, 55 *c*). He may have an inspection or view, if he deems it expedient, for the better disposal of the controversy before him (*ibid.*, r. 48). He may at any stage of the proceedings state a special case for the opinion of the Court on any question of law arising in the reference (*ibid.*, rr. 52, 52 *a*, 55 *c*; Arbitration Act, 1889, s. 19). His decision must be embodied in an *award*, in which he must direct how judgment shall be entered; and he may give any certificate, and make any order as to costs, etc., that a judge at a trial at Nisi Prius can give or make (Order 36, rr. 50, 52 *a*, 53, 55 *b*, 55 *c*; Order 40, r. 2).

Either party may move to set aside the award of an official referee, wholly or in part, on any ground on which he might move to set aside the decision of a judge (Order 40, r. 6). If the action be in the Queen's Bench Division, any motion to set aside such award, and also apparently any motion for a new trial (*Forrest v. Todd*, 1897, 76 L. T. 500), must still be made to a Divisional Court, and not to the Court of Appeal (Order 59, r. 3; *Glasbrook v. Owen*, 1890, 7 T. L. R. 62; *Gower v. Tobitt*, 1891, 39 W. R. 193), whether final judgment has already been entered in pursuance of the award or not (*Proudfoot v. Hart*, 1890, 25 Q. B. D. at p. 43); the notice of motion must be given within the time prescribed by Order 39, r. 4 (*Forrest v. Todd*, *supra*); and from the decision of the Divisional Court an appeal lies to the Court of Appeal, without leave (*Munday v. Norton*, [1892] 1 Q. B. 403). But if the action be in any other Division, then the rule apparently is that, till judgment is entered in accordance with the award, the application should be made to the judge to whom the action was assigned; if, however, judgment has been already signed, to the Court of Appeal (*Serle v. Fardell*, 1890, 44 Ch. D. 299). In either case the notice of motion must state in general terms the grounds of the application, and a copy of every affidavit which it is intended to use at the hearing of the motion should be served with the notice of motion (Order 52, r. 4).

On the hearing of such a motion, the Court (whether a Divisional Court or the Court of Appeal) has power, *inter alia*, under Order 58, r. 4, and Order 59, r. 3—

(*a*) to set aside the award or any part thereof, and any judgment entered in pursuance thereof;

(*b*) to remit the cause or matter, or any part thereof, to the same or any other referee for reconsideration, with such directions as they may think fit (*e.g.* where fresh material evidence has been discovered since the making of the award, as in *In re Keighley and Bryant*, [1893] 1 Q. B. 405; and see secs. 10, 16, 17 of the Arbitration Act, 1889);

(c) to direct judgment to be entered for either party, or make such other order therein as may be just (*Clark v. Sonnenschein*, 1890, 25 Q. B. D. 464; *Joyner v. Weeks*, [1891] 2 Q. B. 31).

It is specially enacted by sec. 15, subsec. (2), of the Arbitration Act, 1889, that "the report or award of any official or special referee or arbitrator on any such reference shall, unless set aside by the Court or a judge, be equivalent to the verdict of a jury." But, on a motion to set it aside, it is not treated as a verdict, which can only be set aside if it be perverse or unreasonable; it is treated "as the decision of a judge trying a case without a jury" (*Clark v. Sonnenschein*, 1890, 25 Q. B. D. 464).

2. REFERENCES FOR INQUIRY OR REPORT.

Subject to rules of Court, and to any right to have particular cases tried by a jury, the Court or a judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry or report to any official referee, and may adopt his report wholly or in part, and may enforce it, if adopted, in the same way as a judgment or order to the same effect would be enforced (Arbitration Act, 1889, s. 13). Under this section the official referee reports to the Court or judge. The subsequent procedure depends chiefly on whether the cause or matter has or has not been adjourned for further consideration. If the further consideration of the cause or matter has been adjourned, any party may apply on such further consideration, without notice of motion or summons, to the Court or judge to adopt the report; or may, by a four days' notice of motion to come on with the further consideration, apply to have the report varied, wholly or in part, or to have the cause or matter, or any question arising therein, remitted to the same or any other referee for further inquiry or report. If, however, the further consideration of the cause or matter has not been adjourned, any party may take out a summons, or may move the Court or judge to adopt or to vary the report, wholly or in part, or to remit the cause or matter, or any question arising therein, to the same or any other referee for further inquiry or report (Order 36, rr. 54, 55; Judicature Act, 1884, s. 8; and Arbitration Act, 1889, ss. 10, 16, 17; *Burrard v. Calisher*, 1882, 19 Ch. D. 644; *Walker v. Bunkell*, 1883, 22 Ch. D. 722).

The power conferred on the Court or a judge by sec. 13 of the Arbitration Act, 1889, to refer any question arising in an action to an official referee, is frequently exercised in cases where a difficult account has to be taken. At any stage of the proceedings in any cause or matter, the Court or a judge may direct any necessary accounts to be taken, notwithstanding that there may be some further relief sought for, or some special issue still to be tried (Order 33, r. 2). And now such an account may be sent to be taken by an official referee (*Rochefoucauld v. Boustead*, [1897] 1 Ch. 196, 213). The Court or a judge may, in its order, give special directions as to the mode in which the account is to be taken or vouched; it may, for instance, direct that the books of account, in which the accounts in question have been kept, shall be taken as *prima facie* evidence of the truth of the matters contained in them (Order 33, r. 3). But, in the absence of any such special direction, the official referee is allowed a wide discretion as to his mode of procedure. He is not bound to take the account in the strict way usually adopted before a Master in Chancery Chambers; he may adopt that method if he thinks it convenient, or any other method that in his opinion will best advance the ends of justice (*In re Taylor*, *Turpin v. Pain*, 1890, 44 Ch. D. 128; and see Seton, 5th ed., vol. ii. ch. 45, pp. 1149-1183).

3. ASSESSMENT OF DAMAGES.

In every action or proceeding in the Queen's Bench Division in which the amount of damages sought to be recovered is substantially a matter of calculation, it shall not be necessary to issue a writ of inquiry, but the Court or a judge may direct that the amount for which final judgment is to be entered shall be ascertained by an official referee. The attendance of witnesses and the production of documents before such official referee may be compelled by *subpœna*. Such official referee shall indorse the amount found by him upon the order referring the amount of damages to him, and shall deliver the order, with such indorsement, to the person entitled to the damages. All subsequent proceedings as to taxation of costs, entering judgment, and otherwise, are taken precisely as though the amount so found had been assessed by a jury upon a writ of inquiry (Order 36, rr. 57 and 57 a).

Official Reports.—See ACT OF STATE, vol. i. p. 40.

Official Secrets Act, 1889.—By this Act (52 & 53 Vict. c. 52) it is made a misdemeanour to wrongfully obtain information as to any fortress, dockyard, office, etc., of Her Majesty, or, having such information, or any information relating to the naval or military affairs of Her Majesty, to communicate the same to any person to whom it ought not in the interest of the State to be communicated at the time, and also for any official at any time corruptly, or contrary to his official duty, to communicate any document, sketch, etc., or information to any such person as aforesaid. A Government contractor, not under an obligation of secrecy, is exempted from the last provision. The offence becomes a felony if the information is communicated, or intended or attempted to be communicated, to any foreign State. Anyone who incites, counsels, or attempts to procure another to commit an offence under the Act, is liable to the same punishment as if he had committed the offence. No prosecution can be instituted except by or with the consent of the Attorney-General.

Official Solicitor.—The title of this officer has varied at different periods. Originally he was attached to the Court of Chancery, and was called the Solicitor to the Suitors' Fund. The first order appointing a solicitor to that fund, which the research of Mr. Sanders was able to discover, is dated 26th July 1828. His duties, so far as they related to funds in Court, were to protect that fund and the Suitors' Fee Fund, and to administer, under the direction of the Court, so much of them as came under the spending power of the Court. By an order dated 5th March 1836, under the authority of the Chancery Regulation Act, 1833 (3 & 4 Will. IV. c. 94), the statute under which the Suitors' Fee Fund was created, provisions were made which directed that all claims for money out of those funds, except in cases of *forma pauperis*, should be made by the solicitor to the fund. Upon the refusal of such solicitor to apply, the party making the claim was to be at liberty to bring the propriety thereof before the Court. It was also necessary that in every case where application was intended to be made for the discharge of any prisoner in contempt, and for payment of the costs of such contempt

out of the Suitors' Fund, under the provisions of the Contempt of Court Act, 1830 (11 Geo. IV. and 1 Will. IV. c. 36), notice of such application, and of any order directing an inquiry as to the poverty of any prisoner in contempt, should be served on the solicitor to the Suitors' Fund (12 Cons. Order, r. 5).

The Suitors' Fund and the Suitors' Fee Fund were by the Courts of Justice (Salaries and Funds) Act, 1869 (32 & 33 Vict. c. 91), s. 4, transferred to the National Debt Commissioners. See, as to the history of the two funds, PAY OFFICE.

The title of the office was subsequently changed to that of "Solicitor to the High Court of Chancery." Finally, since the Judicature Act, the holder of the office has borne the present style of "Official Solicitor of the Supreme Court."

It seems that, even after the payments of salaries of the officers of the Court, the travelling expenses of the Masters in Lunacy, and the incidental expenses of the Courts had ceased to be defrayed out of the Suitors' Fee Fund, but were paid out of the Votes, the official solicitor continued for some time to perform the same duties as formerly in respect of such matters. The accounts were checked by him, and a certificate obtained in the chambers of the Master of the Rolls, which was the authority for their payment by the Paymaster-General. The solicitor to the Court also assisted the Chancery Paymaster in the preparation of the estimates for Parliament (Evidence of Mr. H. L. Pemberton before Legal Department Commission, 1875, pp. 346, 347). The official solicitor has no longer any functions to discharge with reference to funds in Court. It is, however, provided that a copy of every petition or summons dealing with funds which have been placed in the list of dormant funds shall, where such funds shall amount to or exceed in value £500, be served upon him, unless the Court or a judge shall otherwise direct (R. S. C. 1883, Order 22, r. 12 b). See DORMANT FUNDS.

Visiting Prisoners confined for Contempt.—By the Court of Chancery Act, 1860 (23 & 24 Vict. c. 149), s. 2, it is provided that in the last week of each of the months of January, April, July, and October in every year, the official solicitor, or some other officer to be appointed by the Lord Chancellor from time to time, shall visit Holloway Prison and examine the prisoners confined there for contempt, and report his opinion on their respective cases to the Lord Chancellor; and thereupon the Lord Chancellor may, if he thinks fit, assign a solicitor to any such prisoner, not only for defending him *in forma pauperis*, but generally for taking such steps on his behalf as the nature of the case may require; and may make all or any such orders as the Lord Chancellor was empowered to make, after the like report of a Master, under the seventh rule of the Contempt of Court Act, 1830. The official solicitor may examine any prisoner, and all other persons whom he may think it proper to examine, upon oath, and may order production of documents (23 & 24 Vict. c. 149, s. 3).

When a prisoner is confined to any prison other than Holloway Prison under any writ or order of the Chancery Division, the gaoler or keeper of the prison must, within fourteen days after such person shall have been in his custody, make a report to the Lord Chancellor containing the prescribed particulars. If the prisoner makes oath before one of the visiting justices, or a commissioner for taking oaths, that he is unable, by reason of poverty, to employ a solicitor, the report must contain a statement to that effect; and the Lord Chancellor may thereupon direct the official solicitor to ascertain the truth of such statement, and, if true, to take such steps on

behalf of any such prisoner as the nature of the case may require (23 & 24 Vict. c. 149, s. 5). By the same Act power was given to the official solicitor to make all necessary payments on behalf of pauper prisoners, and charge them against the Suitors' Fund; but if any such prisoner should become entitled to any funds in the cause, such funds should be applied in repayment to the Suitors' Fund of the sums expended on his behalf, and any costs to which he might become entitled in such suit should be paid into such fund (23 & 24 Vict. c. 149, s. 6). The Treasury now takes the place of the Suitors' Fund for the purposes of the above provision.

An order to assign a solicitor to a pauper defendant for want of an answer was of course (*Layton v. Mortimore*, 1860, 2 De G., F. & J. 353). No order could be obtained except on the application of a defendant (*Watkin v. Parker*, 1836, 1 Myl. & Cr. 370; *Garrod v. Holden*, 1841, 4 Beav. 245; *Hall v. Hall*, 1871, L. R. 11 Eq. 290).

Paupers.—The official solicitor is also frequently assigned as solicitor to parties defending *in formâ pauperis* (see *IN FORMÂ PAUPERIS*).

Guardian ad litem, where Default of Appearance by Parties under Disability.—Where default has been made in appearance by defendants who are infants or persons of unsound mind, not so found by inquisition, and it consequently becomes necessary to have recourse to the provisions of Order 13, r. 1, to obtain the appointment of a guardian *ad litem*, it is very usual to appoint the official solicitor to discharge that office (*Thomas v. Thomas*, 1843, 7 Beav. 47; *Sheppard v. Harris*, 1845, 10 Jur. 24; *Bentley v. Robinson*, 1853, 9 Hare, App. lxxvi.; *M'Keverakin v. Cort*, 1844, 7 Beav. 347; *Moore v. Platel*, 1845, 7 Beav. 583; *Biddulph v. Lord Camoys*, 1846, 9 Beav. 548; *Charlton v. West*, 1861, 3 De G., F. & J. 156; decided under the old practice of the Court of Chancery).

Where the official solicitor is appointed to act as guardian *ad litem* of an infant or person of unsound mind, the Court may direct that the costs to be incurred in the performance of the duties of such office shall be borne and paid either by the parties, or some one or more of the parties, to the cause or matter in which such appointment is made, or out of any fund in Court in which the infant or person of unsound mind may be interested, and may give directions for the repayment or allowance of such costs as the justice and circumstances of the case may require (Order 65, r. 13). The Court usually directs the plaintiff to pay the costs, and to add them to his own (*Harris v. Hamlyn*, 1849, 3 De G. & Sm. 473; *Frazer v. Thompson*, 1860, 1 Gif. 337; 4 De G. & J. 659). In the last-named case it had previously been decided that there was no power to order the costs of the guardian to be paid out of the Suitors' Fund (*Frazer v. Thompson*, 1859, 4 De G. & J. 659). See *GUARDIAN AD LITEM*.

In Cases of Delay.—Where it appears that there has been any undue delay in the prosecution of any accounts or inquiries, or in any other proceeding under any judgment or order, the official solicitor may be called in, and may be directed to conduct any proceedings, and carry out any directions which may be given. His costs have to be paid by such parties, or out of such funds, as the Court may direct; and if not otherwise paid, the same are to be paid out of such moneys (if any) as shall be provided by Parliament (Order 33, r. 9).

Conduct of Sale.—Occasionally, when all parties to an action have liberty to bid at a sale ordered by the Court, and when they are unable to agree amongst themselves upon an independent solicitor to conduct the sale, the official solicitor is appointed by the Court for the purpose.

Lunacy.—Where the Commissioners or Visitors in Lunacy make a

report to the Lord Chancellor that a lunatic or his property is not duly looked after, such report is frequently sent to the official solicitor, that he may investigate the matter, and take the necessary proceedings upon it.

By the Rules in Lunacy, 1893, it is provided that

upon any application under sec. 116 [see article LUNACY, vol. viii. at p. 60] of the Lunacy Act, 1890 (53 Vict. c. 5), the Masters may, if they consider it desirable for the care of the person or for the management of the estate, or otherwise in the interest of any lunatic or alleged lunatic, direct such person as they think fit to present a petition for an order for inquisition as to the lunatic or alleged lunatic; and if such direction is not complied with within ten days, or such further time as the Masters allow, the Masters may direct such petition to be presented by the official solicitor (r. 1).

If it appears to the Masters that there is undue delay in any matter before them, or if they are otherwise dissatisfied with the conduct of any proceedings, or with the mode in which any order made, or direction given, by the Masters is being carried out, they may summon before them the party having the conduct of the proceedings, or any other person appearing to be answerable, to explain the delay or other conduct with which they are dissatisfied, and may make such order as the circumstances require; and for the purpose aforesaid, the Masters may direct the official solicitor to summon the persons whose attendance is required, and to conduct any proceedings and carry out any directions; and the Masters may, if they think fit, appoint the official solicitor to act as solicitor in such matter in the place of any solicitors previously acting (r. 2 (1)). An order under this rule is subject to appeal to the judge in accordance with r. 11 of the Rules in Lunacy, 1892 (r. 2 (2)).

Any costs incurred by the official solicitor in relation to any proceedings taken by him pursuant to the directions of the Masters are to be paid by such parties, or out of such funds as the Masters direct (r. 3).

Judicial Trustee Act, 1896.—The rules under the Judicial Trustee Act, 1896 (59 & 60 Vict. c. 35), provide that where an official of the Court is appointed a trustee, the official solicitor shall, except where the appointment is made in a district registry, a Palatine Court, or a County Court, be so appointed, unless, for special reasons, the Court direct that some other official of the Court should be so appointed (rr. 7 (1), 29, 30, 31).

He is not required to give security as a judicial trustee, as in the case where a non-official trustee is appointed (r. 9 (1)).

Any remuneration, allowances, or other payments payable to an official judicial trustee on account of his services as trustee are to be paid, accounted for, and applied in such manner as the Treasury directs (r. 18).

Generally.—In addition to the special duties above specified, the official solicitor acts generally in all cases in which the Court requires the assistance of a solicitor; and it has been said that "he is the general intermediary of the Lord Chancellor in respect of a large amount of public business in connection with the Courts" (31 Sol. J. 56).

[*Authorities.*—Daniell's *Chancery Practice*, 6th ed., 1882; Second Report of Legal Departments Commission, 1874; Sanders' *Orders of the High Court of Chancery*, 1845; Sidney Smith's *Chancery Practice*, 7th ed., 1862.]

Official Trustees of Charities.—See CHARITY COMMISSION, vol. ii. at p. 474.

Officiariis non faciendis vel amovendis. So termed was a writ (now fallen into disuse) directed to the magistrates of a corporation, requiring them not to make such a man an officer, and to put him out of the office which he holds until inquiry be made into his character, according to an inquisition formerly ordained (see *Reg. Orig.* fol. 126; Blount; Cowel). The remedy in such cases has long been by

Quo warranto (*R. v. Harris*, 1831, 1 Barn. & Adol. 936), and now, since the Judicature Act, by information in the nature of a writ of *Quo warranto* (see *QUO WARRANTO*).

Off-Licence.—See LICENSING.

Offspring.—"When a man uses the term 'offspring,' 'issue,' or 'descendants,' they are vague expressions, which no doubt, on the particular context, may mean 'children' or remote descendants; but *prima facie*, it can hardly be supposed to mean 'children,' when that simple word is so obvious a one to use. The word 'offspring' in its proper and natural sense extends to any degree of lineal descendants, and has the same meaning as 'issue'" (per Kindersley, V.C., *Young v. Davies*, 1863, 32 L. J. Ch. 373; see also *Thompson v. Beasley*, 1855, 24 L. J. Ch. 327).

"Offspring," children entitled to the exclusion of grandchildren in *Lister v. Tidd*, 1861, 29 Beav. 618.

Often.—A covenant for renewal of a lease containing the words "as often as," does not give a right to a perpetual renewal (see *Swinburne v. Milburn*, 1884, 54 L. J. Q. B. 6).

Old Bailey.—See CENTRAL CRIMINAL COURT.

Old Inclosures.—See INCLOSURE ACTS, vol. vi. at pp. 337–8, as to "ancient inclosures"; and consult *Hornby v. Silvester*, 1888, 20 Q. B. D. 797.

Old Rent.—See ACCUSTOMED RENT.

Old Style.—In the year B.C. 45, the Roman Calendar was reformed by Julius Cæsar, and the 1st of January was reckoned the first day of the year, a common year having 365 days, and every fourth year (called *bissextile*) 366 days. This is called the Julian or Old Style. This calendar was defective, as the solar year consists of 365 days, 5 hours and 49 minutes, and not of 365 days and 6 hours; and therefore Augustus Cæsar, in B.C. 8, reformed the calendar still further, but not perfectly; and the difference in the 16th century amounted to ten whole days, the vernal equinox falling on the 11th instead of the 21st of March. The calendar was again reformed by Pope Gregory XIII. (see *NEW STYLE*). The Julian or Old Style is still in use in Russia, and in those countries where the Greek Church is dominant. At the present time there is a difference of twelve days between the Old and New Style, in consequence of the 29th of February 1800 having been unwritten in those countries where the New Style has been adopted.

Oleron, Roles or Loïs or Jugements d' (*Rooles of Oleron*).—A collection of customs of the sea, deriving their name from an

island on the west coast of France, and alleged to have been put into the form of a code under the Dukes of Guyenne as early as the twelfth century. Their authority spread northwards to England and the Netherlands, and southwards to Spain.

Cleirac attributed them to Eleanor of Aquitaine, who, he tells us, drew them up on her return from the Holy Land, and called them after her favourite island of Oleron. They—

“are of such a general, common, and similar nature, as to be applicable to intercourse between the individual inhabitants of different independent countries when at peace with each other, as well as between individuals of one and the same nation. And to this extent the compilation may be viewed as a body of international law for the maritime commercial intercourse of independent nations during peace.”

(*Maritime Int. Law*, Edinburgh, 1844.)

Omissions.—See CLERICAL ERROR; DEFAULT BY LOCAL AUTHORITY; JURISPRUDENCE; NEGLIGENCE.

Omnibus.—Omnibuses are regulated by the Stage Carriage Acts (2 & 3 Will. IV. c. 120; 3 & 4 Will. IV. c. 48; and 5 & 6 Vict. c. 79), and, within the Metropolitan Police District, by the Hackney and Stage Carriage Acts (1 & 2 Will. IV. c. 22; 6 & 7 Vict. c. 86; 13 & 14 Vict. c. 7; 16 & 17 Vict. c. 33; 16 & 17 Vict. c. 127; some of these apply only within a part of the district), and by the Metropolitan Public Carriages Act, 1869 (32 & 33 Vict. c. 115). In towns to which the Towns Clauses Act, 1847, has been applied, the regulations of that Act apply. The regulations of these Acts correspond very closely to those in force with respect to cabs, and it is sufficient to refer generally to the article CAB (vol. II. p. 319), and to the statutes cited themselves. Under the Metropolitan Public Carriages Act (s. 9), the Home Secretary may make orders regulating omnibuses, and an order has been made.

A “stage carriage” is a carriage for the conveyance of passengers which plies for hire in a public street or place, and in which the passengers, or any of them, are charged separate fares. It is a Metropolitan stage carriage if it plies in the Metropolis, and does not on every journey go to or come from a place outside the Metropolitan Police District (32 & 33 Vict. c. 115, s. 4; 6 & 7 Vict. c. 86, s. 2).

The carriage, and also the driver and conductor, must be licensed; and the Commissioner of Police may make orders as to stopping-places and stands (16 & 17 Vict. c. 33), and as to the route (Metropolitan Streets Act, 1867, s. 11; Metropolitan Police Act, 1839, s. 53). The omnibus must not stop to take up or set down passengers except as near as may be to the near side of the road (Metropolitan Streets Act, 1867, s. 8), and not at prohibited places (*ibid.*, s. 11). It is an offence for the conductor to wilfully deceive any person as to the route or destination (6 & 7 Vict. c. 86, s. 33), or to charge or receive more than the lawful fare (*ibid.*, 2 & 3 Will. IV. c. 120, s. 47), or to refuse to carry, at the lawful fare, any passenger, if there is room, and to whose admission no reasonable objection is made (6 & 7 Vict. c. 86, s. 33). Lamps must be carried inside, and kept lighted after sunset (16 & 17 Vict. c. 33, s. 14). No advertisements or bills must be put on the carriage inside or outside so as to obstruct the light or ventilation, or cause annoyance to passengers (*ibid.*, s. 15). The justices have jurisdiction to deal with complaints under the Acts.

[*Authority*.—A careful summary of the Acts will be found in Archibald's *Metrop. Police Guide*, 1896.]

On.—The most important use of this word in legal phraseology is when it introduces a clause of the nature of a condition precedent. In such a case the clause so beginning will have to be strictly observed before the main provision to which it is annexed can have its effect. This is the force of the phrase "consequential on" in the Factory and Workshop Act, 1895 (58 & 59 Vict. c. 37), s. 12; "on and after the day of" in the Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 8 (1); "on the commencement of this Act" in the Stannaries Court (Abolition) Act, 1896 (59 & 60 Vict. c. 45), s. 1 (1); "on the passing of this Act" in the Cleansing of Prisons Act, 1897 (60 & 61 Vict. c. 31), s. 1; "on application" in the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 13 (1), (2); the Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 6 (2); the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 70 (4); the Conciliation Act, 1896 (59 & 60 Vict. c. 30), s. 2 (c), (d); the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 53, etc; "on being satisfied" in the Conciliation Act, 1896 (*supra*), s. 1 (5), and the Factory and Workshop Act, 1895 (*supra*), s. 40 (6); "on complaint by" in the Factory and Workshop Act, 1895 (*supra*), ss. 2 (1), 4 (1), 10 (1); "on demand" in 27 Geo. II. c. 20, s. 2; "on representation made" in the Extradition Act, 1895 (58 & 59 Vict. c. 33), s. 1 (1); "on request" in the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 1 (4); "on summary conviction" in the London Cab Act, 1896 (59 & 60 Vict. c. 27), s. 1, and the Locomotives on Highways Act, 1896 (*supra*), s. 7; "on the death of" in the Land Transfer Act, 1897 (*supra*), s. 6 (4), and the Finance Act, 1896 (59 & 60 Vict. c. 28), s. 21; "on such consideration" in the Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 9 (3); "on the first registration" in the Land Transfer Act, 1897 (*supra*), s. 15 (2); etc. So in agreements, mention of an event preceded by the word "on" will generally form a condition precedent. For instance, we find the phrases "on allotment" (*Richmond Hill Hotel Co., Elkington's case*, 1867, L. R. 2 Ch. 511), "on application" (*Richmond Hill Hotel Co., Elkington's case, supra*), "on the distinct understanding that" (*Shaw's case*, 1876, 34 L. T. 715), "on attaining" (*Muskett v. Eaton*, 1875, L. R. 1 Ch. D. 435; *Alexander v. Alexander*, 1855, 24 L. J. C. P. 150), "on demand" (*Charinton v. Johnson*, 1845, 14 L. J. Ex. 299), "on Dutch terms" (*Hendricks v. Australasian Insurance Co.*, 1874, L. R. 9 C. P. 460), "on the decease of" (*Coltsmann v. Coltsmann*, 1868, L. R. 3 H. L. 121; *Parker v. Birks*, 1854, 24 L. J. Ch. 117; *Ex parte Davies*, 1851, 21 L. J. Ch. 135), "on right delivery of cargo" (*Paynter v. James*, 1867, L. R. 2 C. P. 348), "on retirement" (*In re Ward*, [1897] 1 Q. B. 266), etc. In all such cases the condition introduced by the word "on" must be observed in the first place. So with regard to the phrase "on attaining" a certain age as a condition to a bequest—unless the age is attained, the vested interest or contingent remainder which passed at the testator's death will be defeated (*Muskett v. Eaton, supra*; *Alexander v. Alexander, supra*). So, too, where the condition is to pay "on demand," some demand is necessary (*Charinton v. Johnson, supra*); though in the case of bills of exchange payable on demand the period of limitation runs from the date of the bill, and not the demand (*Maltby v. Murrells*, 1860, 29 L. J. Ex. 377; *Norton v. Ellam*, 1837, 6 L. J. Ex. 121; cp. Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61, ss. 10, 86). In such cases,

however, a reasonable opportunity must be given to pay after demand made, and to enable the debtor to find out his creditor (*Blackburn, J., in Toms v. Wilson*, 1862, 32 L. J. Q. B. 33, at p. 37), even when the words are so strong as "instantly on demand, and without delay on any pretence whatsoever" (*Massey v. Sladen*, 1868, L. R. 4 Ex. 13; cp. *Brighty v. Norton*, 1862, 32 L. J. Q. B. 38; *Toms v. Wilson, supra*; Bills of Exchange Act, 1882, *supra*, s. 86). But if it is clearly shown that the payment and the demand are to be collateral facts, no delay will be justifiable (*Paynter v. James, supra*; *Norton v. Ellam, supra*). In the case of goods sent "on sale or trial," or "on sale and return," the phrases introduced by "on" are also of the nature of conditions precedent. There will therefore be no sale until approval has been expressed or can be implied, or until the time allowed for trial has expired, or after the lapse of a reasonable time without return of the goods (*Moss v. Sweet*, 1851, 16 Q. B. 493; Benjamin on *Sale*, 590, 591); and if the goods have perished without negligence in the meantime, the loss will fall on the would-be seller (*Elphick v. Barnes*, 1880, L. R. 5 C. P. D. 321; but see also *Ray v. Barker*, 1879, L. R. 4 Ex. D. 279). Sometimes, also, the word "on" introduces a condition precedent as to time, as in the phrase "on or before" a certain day (*Jackson v. Turquand*, 1869, L. R. 4 H. L. 305; *Addinell's case*, 1865, L. R. 1 Eq. 225; cp. the Companies Act, 1862, 25 & 26 Vict. c. 89, s. 26).

But, secondly, "on" may not introduce a condition precedent, but be used in a general way with reference to time, place, event, etc. Here the question, if one should arise, is invariably one of fact. For instance, such would be the case with the words "on or in or about" a railway, etc., in the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), s. 7, and with the words "on the said station" (see *Moore v. Shelley*, 1883, L. R. 8 App. Cas. 285), "on the high seas" (Admiralty Court Act, 1840, 3 & 4 Vict. c. 65, s. 6; *The "Mecca,"* [1895] P. 95), "on the premises" (Intoxicating Liquor Act, 1872, 35 & 36 Vict. c. 94, s. 6; *Cross v. Watts*, 1862, 32 L. J. M. C. 73), "on the register" (Land Transfer Act, 1897, 60 & 61 Vict. c. 65, s. 6 (2)), and "on the shore" (*The "Mac,"* 1882, 51 L. J. P. D. 81, where these words were held to mean *near* the shore). Other phrases of importance are "on account of," meaning in reference to (Finance Act, 1896, 59 & 60 Vict. c. 28, s. 32 (2)), or implying agency (24 & 25 Vict. c. 96, s. 68; *R. v. Gale*, 1877, 2 Q. B. D. 141; *R. v. Cullum* 1873, 28 L. T. 571), in both of which cases the substance of the matter must be looked at, and the question decided as one of fact. Payment to some one on account of another implies that the former is bound to account to the latter (*R. v. Gale, supra*). Like "on account of" is the phrase "on behalf of" (Judicial Trustees Act, 1896, 59 & 60 Vict. c. 35, s. 1 (1); Extradition Act, 1895, 58 & 59 Vict. c. 33, s. 1 (1); Bills of Exchange Act, 1882 (*supra*), s. 26; Fine Arts Copyright Act, 1862, 25 & 26 Vict. c. 68, s. 1). The latter phrase also implies agency, so as to fix a *prima facie* liability on the principal (*Aggs v. Nicholson*, 1856, 25 L. J. Ex. 348), though evidence may be given to rebut that *prima facie* liability (*Pike v. Ongley*, 1887, 18 Q. B. D. 708; *West London Commercial Bank v. Kitson*, 1884, 13 Q. B. D. 360). At all events, "on behalf of" shows that there must be two persons, one of whom acts for the other (*Pease v. Norwood*, 1869, L. R. 4 C. P. 235), and whether the condition is fulfilled will be a question of fact in each case (*Petty v. Taylor*, [1896] 1 Ch. 465). "On the part of" some one or other also involves a question of fact (*Raffety v. Schofield*, [1897] 1 Ch. 937). In insurance policies, again, the word indicates the subjects insured, and these being con-

tracts *uberrimæ fidei*, it is implied that there must be subjects answering the description. So we find the phrases "on goods," "on ship," "on freight," "on profits on goods" (*Mackenzie v. Whitworth*, 1875, 1 Ex. D. 36), and "on profit on charter" (*Asfar v. Blundel*, [1896] 1 Q. B. 123). Then, in wills and similar instruments, the phrase "on the body of" frequently occurs; for example, it may be "heirs on the body begotten of a wife," or, more fully, "heirs of the body of the husband begotten by him on the body of the wife," in which case a particular class of heirs of the husband by a particular wife is indicated. "Of the body" is slightly different, as here the heirs of the wife by that husband are meant, and where the phrase used is "heirs begotten by the husband on the body of the wife," it signifies that the heirs of their two bodies are to take, and not those of one more than those of the other. Lastly, we may notice the phrase "on terms," as "on such terms as may seem just," which is a question of fact (*Forster v. Clowser*, [1897] 2 Q. B. 362), or "on the terms stated," which would be a condition (*Jackson v. Turquand*, *supra*).

Once.—"Where a statute requires some act to be done periodically and recurrently once in a certain space of time, as, for instance, the inspection of the boilers of steamers once in six months, it would probably be understood to mean that not more than six months should elapse between the two acts. It would not be satisfied by dividing the year into two equal periods, and doing the act once in the beginning of the first and once at the end of the second period (*Virginia and Maryland Steam Navigation Co. v. U. S.*, Taney and Campbell's Maryland Rep. 418)" (Maxwell on *Interpretation of Statutes*, p. 488).

One.—"It has been often laid down that if a devise be to one of the sons of J. S. (he having several sons), the devise is void for uncertainty, and cannot be made good" (1 Jarm. 340, 5th ed.; but see also Watson, *Eq.* 1298). "Appointment of either one of my three sisters as my sole executrix" held to be void for uncertainty (*In re Blackwell*, 1877, 46 L. J. P. D. & A. 29). So also "I appoint A. as my executor, with any two of my sons," was held void (*In re Baylis*, 1862, 31 L. J. P. M. & A. 119; see also *Bate v. Amherst*, 1793, Ray. T. 82).

"Where a statute appoints a conviction to be 'on the oath of one witness,' this ought not to be by the single oath of the informer; for if the same person shall be allowed to be both prosecutor and witness, it would induce profligate persons to commit perjury for the sake of the reward" (Dwarris on *Statute*, 672).

In distress for rent not exceeding £20, the Statute 57 Geo. III. c. 93 (in the schedule to which the costs are limited, where "one broker or more" is employed) does not repeal the provision of 2 Will. & Mary, c. 5, s. 2, requiring the employment of two sworn appraisers (*Allen v. Tricker*, 1839, 9 L. J. Q. B. 42).

Ontario.—See CANADA.

Onus probandi.—See BURDEN OF PROOF.

Open Contract.—Contracts for sale need not contain conditions as regards title and evidence of title, except in special cases, as where the title is less than forty years, or where deeds abstracted cannot be produced. An open contract may be safely made in case of an ordinarily good forty years' title, but it is advisable in all cases to state the date of commencement (see Vendors and Purchasers Act, 1874; Conveyancing Act, 1881). On an open contract the vendor must bear the expense of procuring and making an abstract of any deed forming part of the forty years' title, although such deed be not in his possession (*In re Johnson and Justin*, 1885, 30 Ch. D. 42).

Open Court.—See CAMERA, IN.

Open Cover.—An open cover is an informal document handed by a marine insurance company to an applicant who at the time has no insurable interest, which entitles him or his assignee, on goods being shipped, and on payment of the premium, to get a policy on the goods shipped. It is peculiar in that it binds the insurance company not only to the actual applicant, but to anyone who comes forward and produces it to them. So, where an open cover was given to M. in order that he might give it to the charterer, who after shipment applied for policies to the amount in the cover, but was refused, it was held that there was a binding contract between such charterer and the company (*Bhugwandass v. Netherlands India Sea and Fire Insurance Co. of Batavia*, 1888, 14 App. Cas. 83). Such a covering note, however, is not a policy of sea insurance within the Stamp Act, 1891, 54 & 55 Vict. c. 39, so as to be capable of being stamped after execution under sec. 95, subsec. 2 (*Home Marine Insurance Co. v. Smith*, 1898, W. N. 42); and it will also be invalid as a marine policy under sec. 93, subsec. 1 (*Home Marine Insurance Co. v. Smith*, *supra*).

Opening—

The Case.—See TRIAL.

The Pleadings.—See TRIAL.

Open Policy.—See MARINE INSURANCE, vol. viii. at p. 146.

Open Spaces.—Until the present reign there was little or no provision for securing to the general population access to parks, commons, or open spaces for purposes of recreation. Though many manorial wastes existed, the public had no right of resort to such lands, although, being described as commons, they were by many supposed to be subject to common use by the lieges. The only exceptions to this rule were certain VILLAGE GREENS not subject to commonable rights, which the inhabitants had a right to use for recreation (Hunter on *Open Spaces*, p. 175).

During the last sixty years much has been done by legislative and individual effort to preserve, acquire, and regulate commons for the purpose of user by the public, independently of the possession of commonable rights. See COMMON; METROPOLITAN COMMONS. There has also been a

good deal of legislation for the preservation, acquisition, and regulation of parks and open spaces, other than manorial wastes, in and near populous places, in the interests of the health and recreation of the populace.

It has taken two directions: (1) the provision by statute or by-law for greater open space about buildings, so as to ensure access of light and air in the interests of public health; (2) provisions for the acquisition and management of parks and pleasure grounds.

(1) In London the provision of open spaces about new buildings is regulated by Part V. of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), which requires a specified amount of space for light and air at the rear of domestic buildings. See LONDON, COUNTY. In the rest of England it is regulated by by-laws of urban district councils or of rural councils, which have received urban powers, made under sec. 157 (3) of the Public Health Act, 1875, for ensuring the sufficiency of space about new buildings to ensure a free circulation of air (Fitzgerald, *Public Health*, 7th ed., 207; Glen, *Public Health*, 11th ed., 370).

(2) The Inclosure Act, 1845 (8 & 9 Vict. c. 118), prohibits the enclosure of village greens, but permits the fixing of their boundaries and making provision for preserving the surface by an enclosure award (s. 15), and for protecting them from nuisances (20 & 21 Vict. c. 31, s. 12). And under sec. 73 of the Act of 1845 allotments may be made under such awards as grounds for exercise and recreation. The greens and grounds need not be fenced (15 & 16 Vict. c. 79, s. 14). Since 1847, under the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34, s. 135), urban authorities have been empowered, by special order or resolution, to purchase or rent lands in their district, or within three miles of its centre, for the purposes of pleasure grounds, or places of public resort or recreation. This power is now possessed by all authorities having urban powers under the Public Health Act, 1875.

In 1853 (18 & 19 Vict. c. 120, s. 239) the local authorities in London were empowered to collect rates for the maintenance of certain enclosed gardens or ornamental grounds; but not to interfere with the management of the grounds by the persons in whom it was vested. Similar provisions had already been inserted in private Acts.

In 1856 (19 & 20 Vict. c. 112, s. 11) the local authorities of London were empowered to acquire, by agreement or gift, lands for open spaces or pleasure grounds for the public benefit of the parish; but cannot spend money out of the rates except to enclose, maintain, plant, or improve the land. They are, for rating purposes, owners of land so acquired (*Islington Vestry v. Cobbett*, [1895] 1 Q. B. 369).

By the same Act (s. 10) the London County Council is empowered to apply to Parliament for powers to provide parks, pleasure grounds, places of recreation, and open spaces, at the expense of the county rate. It is under this power that most of the parks in London (other than the royal parks) have been formed.

In 1859, by the Recreation Grounds Act (22 Vict. c. 27), power was given to owners of land to convey it to trustees, to be held as open public grounds for recreation of adults and children, subject to restrictions and conditions created by the trust deed, and to bequeath personalty not exceeding £1000 for the maintenance of the grounds. The land may be that of private persons, or, subject to the approval of the Local Government Board, the land of a borough or parish. Provision is made for vesting the management in the churchwardens and overseers, under a scheme framed by the Charity Commissioners. Under the Local Government Act, 1894, the

powers of the trustees, if official, pass to the parish council, and even if unofficial, may be transferred to the council.

In 1860, under the Public Improvements Act (23 & 24 Vict. c. 30), rate-payers of a poor-law parish with a population over 500, after adopting the Act, may purchase or lease, or accept gifts or grants of land for public walks and grounds for exercise and recreation, and levy rates, not exceeding sixpence in the £, for their maintenance. In rural parishes these powers are now vested in the parish council, and in urban parishes they may be so vested under sec. 33 of the Act of 1894. The Act applies equally to urban and rural parishes (56 & 57 Vict. c. 73, s. 6).

The next step was an expansion of the provision of the Metropolitan Act of 1855, so as to deal with gardens and ornamental gardens in London and all cities and boroughs. The Town Gardens Protection Act, 1860 (23 & 24 Vict. c. 13), empowers the vesting in the London County Council, the London City Corporation, or the corporation of any municipal borough, or a committee of rated inhabitants, of any enclosed gardens set apart, otherwise than by the revocable provision of the owner, for the use and enjoyment as of right of adjoining residents (*Tulk v. Metropolitan Board of Works*, 1860, L. R. 3 Q. B. 682). Action can be taken only where the garden has existed for fifty years, and is in a neglected condition; and gardens, etc., vested in the Crown or the Commissioners of Works are excluded (s. 6). Provision is made for preventing encroachment, abating buildings erected wrongfully, making by-laws for management, preventing damage, and providing the cost of maintenance out of the county or borough rate. In London the regulation is now effected under an Act of 1890 (53 & 54 Vict. c. cxxliii. ss. 14-17, Sched. B.).

Under the Public Health Act, 1875 (s. 164), urban councils, and district councils with urban powers, may purchase, rent, and maintain public walks and pleasure grounds, or contribute to the maintenance of such walks, and may make by-laws for their regulation.

In 1871 an Act was passed exempting from the Mortmain Acts gifts of land for the purpose of public parks, which was repealed in 1888, and re-enacted as sec. 6 of the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42).

In 1877 began a series of Acts, now known as the Open Spaces Acts. The first were confined to the county of London, but they have been partially extended to all urban districts, and may be extended to rural districts by order of the Local Government Board (50 & 51 Vict. c. 32, s. 5).

The Open Spaces Act, 1877, as amended in 1887 (50 & 51 Vict. c. 32, ss. 5, 6), permits the county council or the local authority in London, and district councils elsewhere, to acquire by purchase or voluntary sale, or by gift, any open space, enclosed or unenclosed, and to hold it in trust for perpetual use by the public for exercise and recreation; and permits the persons exclusively entitled to use open spaces to convey to such public authority, and in trust for the public, the right to enter and use the space.

A like transfer may be made by trustees under local or private Acts of open spaces, holding a trust to regulate and preserve the space for the use of adjoining residents; provided that they can obtain the consent of two-thirds of the residents present at a meeting properly convened. If the soil is vested in the trustees, they can convey it; otherwise they can convey the easement over it only. The price, if any, is held for the benefit of the adjoining residents whose exclusive rights are surrendered (1881, c. 34, s. 21), or for the benefit of the objects to which the rates previously imposed had been applied (1887, c. 32, s. 2 (1)).

A similar provision was made in 1890 as to land held for public recreation by trustees not appointed under local or special Acts, or by trustees or part of a charitable trust (53 & 54 Vict. c. 15, ss. 3, 4)—in the latter case subject to an order of the High Court, and the approvals required under the Charitable Trusts Acts.

Owners of open spaces over which adjoining residents have contractual or other rights of recreation, may convey them to the county council or the local authority in London, or to the district council elsewhere (1881, c. 34, s. 3).

In 1887 the London County Council was also empowered, without resort to Parliament, to buy, rent, plant, lay out, improve, and maintain lands as public walks or pleasure grounds, or support wholly or in part such walks or grounds provided by any person (1887, c. 32, s. 12). This corresponds to the urban power in the Public Health Act, 1875, already mentioned.

Open space in the Acts from 1877 to 1890 means any land, enclosed or unenclosed, which is not built on, and is laid out as a garden, or is used for purposes of recreation, or lies waste and unoccupied (1881, c. 34, s. 1; 1887, c. 32, s. 2), and has not over one-twentieth of it occupied by buildings (1890, c. 15, s. 7). The open space need not be wholly situate in the district of the authority which takes it over (1890, c. 15, s. 6). The space, once acquired, cannot be sold or built on, except buildings auxiliary to their use as pleasure grounds (*A.-G. v. Sunderland*, 1876, 2 Ch. D. 634).

In London closed churchyards and disused burial-grounds, *i.e.* places no longer used for interments (1889, c. 32, s. 4), may be taken over as open spaces on conveyance by the owner, or agreement to or with the county council or the local authority of the district in which they lie (1881, c. 34, ss. 4, 5). When acquired, the land is used for public recreation, but not for games or sports, except by sanction of the bishop, in the case of consecrated ground, or, in other cases, with the sanction of the persons transferring (1887, c. 32, s. 21). The removal of tombstones and monuments is strictly regulated (1887, c. 32, s. 3). No buildings, not even a bandstand, may be erected on disused burial-grounds (*A.-G. v. St. Pancras Vestry*, 1894, 69 L. T. 627). In the case of consecrated ground a faculty must be obtained in order to enable a local authority to manage the ground (1881, c. 34, s. 5; *In re St. Botolph*, [1892] Prob. 173; *In re St. Nicholas Cole Abbey*, [1893] Prob. 58. See Baker on *Burials*, 6th ed., 1898).

The Acts provide for the regulation of all open spaces by the authority in which they are vested, whether under these Acts or otherwise; and the payment of the cost of maintenance out of the local rate (1877, c. 32, ss. 3, 4; 1881, c. 32, s. 10; 1887, ss. 8, 10, 11). Beneficial interests in open spaces cannot be acquired without compensation, which is settled, in case of difference, under the Lands Clauses Acts (1887, c. 34, s. 9).

In the City of London, and under the Corporation of London Open Spaces Act, 1878, the city corporation and not the county council alone can act. The powers of the Open Spaces Acts do not apply to lands belonging to the Crown or the Duchy of Lancaster, or held by the Commissioners of Works, or under the Crown Estate Paving Act, 1851 (Regent's Park Estate), or METROPOLITAN COMMONS (see 1881, c. 34, s. 11; 1887, c. 32, s. 9).

The adoptive Public Health Act, 1890, not applying to London, permits (s. 44) urban councils, to close parks and pleasure grounds for not over twelve days a year (not being Sundays or public holidays), and to use them, gratuitously or otherwise, for public charities or institutions, agricultural shows, or other public purposes; and may provide or license boats on waters in such grounds. A similar power was given to the London County Council in 1895 (58 & 59 Vict. c. cxxvii. s. 45).

Under the Local Government Act, 1894, parish meetings are allowed to adopt the Public Improvement Act, 1860, and parish councils may (1) provide or acquire land for a recreation ground and public walks; (2) exercise, as to recreation grounds, village greens, open spaces, and public walks under their control, or to the expenses of which they contribute, all the powers given to urban councils under sec. 164 of the Public Health Act, 1875, or sec. 44 of the adoptive Public Health Act, 1890.

The by-laws for London are now made under local Acts of 1877 (40 Vict. c. viii.) and 1890 (53 & 54 Vict. c. ccxliii.), and for the rest of the country, whether by urban, rural, or parish councils, under sec. 164 of the Public Health Act, 1875.

It has been held that by-laws may be validly made—

(1) Forbidding shooting or chasing game or animals (*Harper v. Mitchell*, 1880, 44 J. P. 378).

(2) Forbidding public speeches, etc., without leave of the authority (*De Morgan v. M. B. W.*, 1880, 5 Q. B. D. 155).

But a by-law punishing the owner of a trespassing animal has been held bad (*Torquay Local Board v. Bridle*, 1883, 47 J. P. 183).

The decision in *Kruse v. Johnston*, 1898, 14 T. L. R. 416, largely extends the scope of such by-laws.

Opera.—See COPYRIGHT; THEATRES.

Opinion.—1. *Of Judges.*—The judgments of the law lords delivered in the House of Lords are described as “opinions.” The distinction between such opinions and the “judgments” of the judges of the High Court and Court of Appeal is merely one of name. In the United States the statement of reasons delivered by a judge or Court leading to the decision pronounced in any of the Courts, is called an “opinion” (*Bouvier’s Law Dictionary, s.v.*). As to extra-judicial opinions, *i.e.* opinions expressed during the argument, or in the judgment of a case, but upon points not necessary to be decided for the decision of the case, see OBITER DICTUM. Judicial opinions constitute binding PRECEDENTS (*q.v.*). See ADVICE OF COURT and JUDGMENT.

2. *Of Counsel.*—Advising clients is part of the duties of counsel in England. The advice given is a mere statement of opinion upon the facts set forth in the “instructions” laid before counsel, and in respect of his opinion an English barrister undertakes no responsibility (see per Lord Campbell in *Purves v. Landell*, 1845, 12 Cl. & Fin. at p. 102, cited by Mr. Beven, *Negligence*, p. 1450). Counsel’s opinion, unless grossly incompetent, is a protection to a solicitor acting upon it against any complaint of negligence by his client, if the facts have been fairly and properly stated to counsel, but not otherwise (*Andrews v. Hawley*, 1857, 26 L. J. Ex. 323). The advice of counsel is also generally a sufficient justification to a trustee who acts upon it in commencing an action, so as to entitle him to obtain his costs from the trust estate (*Stott v. Milne*, 1884, 25 Ch. D. 710). But it will not diminish the responsibility of the trustee if it has led him to pay the trust funds to the wrong persons (*Doyle v. Blake*, 1804, 2 Sch. & Lef. at p. 243; *In re Jackson*, 1881, 44 L. T. N. S. 467). See TRUSTS.

Opinions of counsel have no authority in English law, such as was attributed to the *responsa prudentium* at Rome, and is now attributed to the opinions of jurists on the Continent. Many text-books written by

eminent counsel have, of course, attained considerable authoritative weight (as to the weight of text-books written by judges see the preface to Fry on *Specific Performance*, 3rd ed.). Formerly, however, judicial references to the "current professional opinion" were not uncommon, and in conveying cases they are still sometimes made. The opinions of the Attorney-Generals advising the President and heads of departments in the United States are published, and form a valuable contribution to the body of public law. There is no such publication of English opinions. See also ADVICE ON EVIDENCE.

3. *Of Expert Witness*.—See EVIDENCE, vol. v. p. 90.

4. *Warranty and Fraud*.—A mere expression of opinion is not such a representation as to constitute a warranty (see CAVEAT EMPTOR and WARRANTY), or found an action for deceit, or justify the rescission of a contract on the ground of fraud (see vol. v. p. 90).

Opposite.—Various meanings are attached to this word in the English language, and when it occurs in a material portion of a deed or other legal instrument, what is to be its signification will have to be deduced from all the circumstances of the case. So, where the conveyance of a house contained a covenant that no building should be erected "opposite" the plot conveyed, it was held that the covenant only applied to that part of the vendor's land which was opposite to, and of the same width as, the piece conveyed, there being nothing to show that the purchaser was to have an unembarrassed view of all the land (*Patching v. Dubbins*, 1853, 23 L. J. Ch. 45). But the word "opposite" is not in such a case *ex vi termini* necessarily confined to land precisely opposite, between parallel lines drawn from the sides of the plot conveyed; and in every instance the construction will depend upon the intention of the obligor, to be derived from the document under consideration.

At the same time, some special meaning may be given to the word. Thus in the Wills Act Amendment Act, 1852 (15 & 16 Vict. c. 24), s. 1, which relates to the signing of wills, it is enacted that a signature shall be good if placed "at or after or following or under or beside or *opposite* to the end of the will," provided, of course, it be intended by the testator as a signature. See WILL.

In the R. S. C. 1883, Order 31, r. 1, it is laid down that in any cause or matter the plaintiff or defendant may, by leave of the Court or a judge, deliver interrogatories in writing for the examination of the *opposite* parties, or any one or more of them. "Opposite party" in that connection has been held to primarily mean the party on the other side of the record to the applicant (*Spokes v. Grosvenor Co.*, [1897] 2 Q. B. 124). But the term also includes a party not on the other side of the record, if there is some issue or other right to be adjusted between him and the applicant, as may often be the case in the Chancery Division between two plaintiffs or two defendants (*Alcoy Railway Co. v. Greenhill*, 1896, 74 L. T. 345; *Shaw v. Smith*, 1886, 18 Q. B. D. 193; *Molloy v. Kilby*, 1880, 15 Ch. D. 162); though not one between whom and the applicant there is no issue (*Marshall v. Langley*, 1889, W. N. 1889, p. 222). Even a third party who has obtained liberty to appear at the trial and oppose the plaintiff's claim, is an opposite party to such plaintiff, so that there will arise a mutual right of interrogation (*Bates v. Burchell*, 1884, W. N. 1884, p. 108; *Eden v. Weardale Co.*, 1887, 35 Ch. D. 287; 34 Ch. D. 223; *McAllister v. Bishop of Rochester*, 1880, 5 C. P. D. 194).

And as to discovery of documents, though the words in r. 12 are "any other party," they have been held to refer to any opposite party (*Shaw v. Smith, supra*; *Brown v. Watkins*, 1885, L. R. 16 Q. B. D. 125).

Oppression.—1. It is said that the oppression and tyrannical partiality of judges, justices, and other magistrates in the administration of justice and under colour of their offices is punishable by impeachment in Parliament or by indictment or information, according to the rank of the offender and the circumstances of the offence (4 Black. *Com.* 14). There is no precedent of a proceeding by indictment or information against a judge of the Superior Courts; the mode of removing them being by joint resolution of both Houses (38 & 39 Vict. c. 77, s. 5); but there are the precedents of the impeachments of Lord Bacon and Lord Macclesfield for corruption (*Lord Macclesfield's case*, 1725, 16 St. Tri. 767–1087).

Where judges of inferior Courts act oppressively and in excess of jurisdiction, they are liable to civil proceedings (*Kemp v. Neville*, 1861, 10 C. B. N. S. 523; *Jones v. German*, (1896) 2 Q. B. 418; [1897] 1 Q. B. 374), and if the excess is wilful or corrupt, to indictment, independently of the proceedings permitted by law for their removal in the case of coroners and County Court judges and justices of the peace by the Lord Chancellor (50 & 51 Vict. c. 71, ss. 8, 33; 51 & 52 Vict. c. 43, s. 15), or in Lancashire by the Chancellor of the Duchy. There is not much modern authority on this subject, but the law was well settled in the last century (*R. v. Palmer*, 1761, 2 Burr. 1162; *R. v. Borron*, 1820, 3 Barn. & Ald. 432; *R. v. Sainsbury*, 1790, 4 T. R. 45; *R. v. Williams*, 1762, 3 Burr. 1317; *R. v. Hall*, [1891] 1 Q. B. 747). Justices are now protected to some extent from civil actions for oppression, etc., by the Justices' Protection Act, 1848 (11 & 12 Vict. c. 44), and the Public Authorities' Protection Act, 1893 (56 & 57 Vict. c. 61).

2. Oppression by executive officers is punishable as misconduct in office as well as by proceedings for the particular illegality constituting the oppression, usually EXTORTION or FALSE IMPRISONMENT. Oppression is punishable as a misdemeanour, and on conviction the office is forfeited. Gaolers were punishable under 14 Edw. III. c. 10 for putting pressure on prisoners with a view to make them confess and give evidence against their confederates, and at common law for misuse of their prisoners (*Hawk. P. C.* bk. i. cc. 66, 68; 3 *Co. Inst.* 91). Sheriffs and similar officers are punishable under sec. 29 of the Sheriffs Act, 1887, and the police under the Police Acts, and the subject is protected against oppression and wrong by other executive officers by the general constitutional rule that the authority of the Crown or act of the State is no answer to any claim for interference with private rights without direct legal justification (see *Raleigh v. Goschen*, [1898] 1 Ch. 73; 14 L. Q. R. 116, 121).

The term oppression now appears in the statute-book only with reference to extortion by the king's officers (Stat. West. sec. (1275), 3 Edw. I. c. 26) and to offences by officers in British possessions abroad. An Act of 1698 (11 Will. III. c. 7) provides for the trial in the High Court in England of governors or commanders-in-chief of plantations or colonies for oppression or any other crime or offence contrary to the law of England or the colony. Acts of 1770 (10 Geo. III. c. 47, s. 4), 1773 (13 Geo. III. c. 63), and 1784 (24 Geo. III. sess. 2, c. 25) made provisions of a somewhat wide character as to oppressions in India, including those of the character alleged against Warren Hastings (see Ilbert, *Government of India*, 1898). By an Act of 1802 (42

Geo. III. c. 85) all offences by persons in British possessions abroad committed under colour or in exercise of office are triable in the High Court in England. It is said that this Act does not extend to felonies (*R. v. Shawe*, 1816, 5 M. & S. 403). The most recent proceeding under these Acts for offences in the nature of oppression is that against Governor Eyre for his action in suppressing the Jamaica rising (*R. v. Eyre*, 1868, 11 Cox C. C. 162). These statutes in no way abridge the right of a person illegally oppressed by a colonial official to sue him in England for the wrong (42 Geo. III. c. 85, s. 6; *Mostyn v. Fabrigas*, 1765, 1 Cowp. 161; *Phillips v. Eyre*, 1869, L. R. 4 Q. B. 225; 6 Q. B. 1; *Musgrave v. Pulido*, 1880, 5 App. Cas. 102; *Companhia de Moçambique v. British South Africa Co.*, [1893] App. Cas. 603; *Anderson v. Gorrie*, [1895] 1 Q. B. 668).

[*Authorities*.—1 Russ. on *Crimes*, 6th ed., 416; Beven on *Negligence*, 2nd ed., bk. ii. c. 1.]

Option.—In accordance with the principle expressed in the maxim, “*Verba chartarum fortius accipiuntur contra proferentem*,” where a lease is granted for “seven or fourteen years,” or “for seven, fourteen, or twenty-one years,” the lessee alone has the option of determining the tenancy at the end of the first seven years, or of the first seven or fourteen years, as the case may be (*Dann v. Spurrer*, 1803, 3 Bos. & Pul. 399, 442; *Doe d. Webb v. Dixon*, 1807, 9 East, 15; *Price v. Dyer*, 1810, 17 Ves. Jun. 363; *Powell v. Smith*, 1872, 41 L. J. Ch. 734—overruling *Goodright d. Hall v. Richardson*, 1789, 3 T. R. 462). So, if money is lent “for a term of six or nine months,” or goods are sold “to be paid for in six or nine months,” the option is with the borrower or the purchaser; and if he does not pay at the end of the six months, he thereby elects to take credit for the longer period, and the debt is not due until the expiration of such longer period (*Price v. Nixon*, 1814, 5 Taun. 338; *Reed v. Kilburn Co-operative Society*, 1875, 44 L. J. Q. B. 126). Where, however, an invoice of goods contained the words “Net cash, to be paid for within six to eight weeks from the date hereof,” and the seller brought an action for the price within seven weeks from the date of the invoice, it was held that, the language of the document being ambiguous, it was a question for the jury whether the credit had then expired according to mercantile usage; and the jury having found that the action was not brought too soon, the plaintiff was held entitled to the verdict (*Ashforth v. Redford*, 1873, L. R. 9 C. P. 20; see also *Alexander v. Vanderzee*, 1872, L. R. 7 C. P. 530).

Where goods were bought to be delivered “at the seller’s option” in August or September, and the seller gave notice that they would be ready for delivery on a certain day in August, it was held that, having by such notice exercised his option, he was bound to deliver in August, and that non-delivery in that month constituted a good defence to an action against the buyer for not accepting the goods (*Guth v. Lees*, 1864, 3 H. & C. 558).

In the case of an alternative gift by will, the option is with the legatee or devisee (*Haggar v. Neatby*, 1853, 23 L. J. Ch. 455). So, where a testator directed money to be laid out in the purchase of lands “of the value of £300 or £400 a year,” to be settled on A. and his heirs, the words were construed in the most liberal sense as of the value of £400 a year (*Seale v. Seale*, 1715, 1 P. Wms. 290).

As to the ratification by a person entitled to an option, of a notice given without his authority of his intention to exercise such option, see *Dibbins v. Dibbins*, [1896] 2 Ch. 348; and as to the effect of sec. 25 of the Companies

Act, 1867, where property is sold to a company for cash, with an option to satisfy the liability in shares instead of cash, see *Barrow's case*, 1880, 14 Ch. D. 432.

As to "cash with option of bill," see CASH, vol. ii. p. 396. See also STOCK EXCHANGE.

Or.—The word "or," in its ordinary and proper sense, is a disjunctive particle, signifying a substitution or alternative (*In re Sampson*, 1884, 25 Ch. D. 482; *Prim v. Smith*, 1888, 20 Q. B. D. 643; *Chipchase v. Simpson*, 1849, 16 Sim. 485). Thus, where there is a bequest "to A. or his children," or "to A. or his issue," the children or issue only take by way of substitution in the event of A. dying during the lifetime of the testator (*Crooke v. De Vandes*, 1803, 9 Ves. Jun. 197; *Penley v. Penley*, 1850, 12 Beav. 547; *In re Webster's Estate*, 1883, 23 Ch. D. 737). So, where there was a gift "to such one or more of the children or grandchildren of A.," it was held that the grandchildren were only entitled by way of substitution, in the event of there being no children (*Margitson v. Hall*, 1864, 9 L. T. 755; cp. *In re Sibley's Trusts*, 1877, 5 Ch. D. 494). A gift of money to trustees, in trust to pay the same "unto and amongst the brothers and sisters of the testator or their children" in such shares, etc., as the majority of the trustees should think proper, gives power to the trustees to appoint either to the parents or children (*Longmore v. Broom*, 1802, 7 Ves. Jun. 124). So, a bequest in trust "for charitable or other purposes," or "to be applied for any charitable or benevolent purpose," is void for uncertainty, because it gives the trustees discretion to apply it to purposes other than charitable, though a gift "for charitable purposes" would be valid (*In re Hewitt's Estate*, 1883, 53 L. J. Ch. 132; *In re Jarman's Estate*, 1878, 8 Ch. D. 584; *Ellis v. Selby*, 1835, 7 Sim. 352; 1 Myl. & Cr. 286). So, sec. 3 (1) of the Licensing Act, 1872 (35 & 36 Vict. c. 94), prohibiting the sale of intoxicating liquors without a licence, and providing that for the first offence the offender "shall be liable to a penalty not exceeding £50, or to imprisonment with or without hard labour for a term not exceeding one month," empowers the justices either to fine or imprison, but not to impose a fine and order imprisonment in default of payment (*In re Clew*, 1881, 8 Q. B. D. 511; *In re Brown*, 1878, 3 Q. B. D. 545). In *Hills v. London Gas Co.*, 1860, 29 L. J. Ex. 409, however, the words "hydrated or precipitated oxides" were, under the circumstances, construed as meaning such hydrated oxides as were precipitated, the word "precipitated" being treated as narrowing and correcting the generality of the word "hydrated" (cp. *Elliott v. Turner*, 1845, 2 C. B. 446; *Simpson v. Holliday*, 1866, L. R. 1 H. L. 315).

The word "or" may be construed as "and," and the word "and" may be construed as "or," especially in the case of a will, if it is necessary in order to put a reasonable construction upon the instrument in which the word is used, or in order to give effect to what plainly appears from the context to have been the intention of the testator or parties to the instrument (*White v. Supple*, 1842, 2 Dr. & War. 471; *Day v. Day*, 1854, 1 Kay, 703; *Stubbs v. Sargon*, 1838, 3 Myl. & Cr. 507; *Maynard v. Wright*, 1858, 26 Beav. 285; *Jackson v. Jackson*, 1748, 1 Ves. 217; *Stapleton v. Stapleton*, 1852, 2 Sim. N. S. 212; *Maberly v. Strode*, 1797, 3 Ves. Jun. 450; *Maude v. Maude*, 1856, 22 Beav. 290; *Read v. Snell*, 1743, 2 Atk. 643; *Harris v. Davis*, 1844, 1 Coll. 416; *Greenway v. Greenway*, 1860, 29 L. J. Ch. 601). But such a construction is only admissible when the context makes

it evident, or at all events furnishes very strong grounds for presuming, that it was so intended (*Coates v. Hart*, 1863, 3 De G., J. & S. 504; *Seccombe v. Edwards*, 1860, 28 Beav. 440; *In re Sander's Trusts*, 1866, L. R. 1 Eq. 675; *Doe v. Jessep*, 1810, 12 East, 288; *Grey v. Pearson*, 1857, 6 Cl. H. L. 61; *Barker v. Young*, 1864, 33 L. J. Ch. 279; *Wingfield v. Wingfield*, 1878, 9 Ch. D. 658). It is, however, a settled rule, that where an estate of inheritance is devised to A., with an executory devise over in the event of his dying under the age of twenty-one or without issue, the word "or" will be construed as "and," and A.'s estate will become absolute, and the executory devise be defeated, upon his attaining the age of twenty-one or having issue (*Eastman v. Baker*, 1808, 1 Taun. 174; *Right v. Day*, 1812, 16 East, 69; *Johnson v. Simcox*, 1862, 31 L. J. Ex. 38; *Morris v. Morris*, 1853, 17 Beav. 198; *Greated v. Greated*, 1859, 26 Beav. 621; *Fairfield v. Morgan*, 1806, 2 Bos. & P. N. R. 38). But where there was a devise to A. for life, and after his death to his eldest son in fee-simple, with an executory limitation over in case A. should not live to a certain age or not have any son, it was held that this rule of construction did not apply, and A. having attained the age and died without issue, that the gift over took effect (*Cooke v. Mirehouse*, 1864, 34 Beav. 27). See, also, Williams on *Executors*, pp. 936, 937, 977-979; Theobald on *Wills*, 343, 539, 540, 572, 573; and Jarman on *Wills*, 470 *et seq.*, 483 *et seq.*

In *Townsend v. Read*, 1861, 30 L. J. M. C. 245, it was held that in sec. 111 of the Highway Act, 1835 (5 & 6 Vict. c. 50), the word "and" was inserted instead of "or" by mistake, and the section was construed accordingly (cp. *R. v. Phillips*, 1866, L. R. 1 Q. B. 648, where the Court, overruling *R. v. Shiles*, 1841, 1 Ad. & E. N. S. 919, refused to read "or" as "and" in sec. 85 of the same statute). In *Fowler v. Padget*, 1798, 7 T. R. 509, "or" was construed as "and" in the Act of 1 Jac. I. c. 15, which made it an act of bankruptcy for a debtor to depart from the country with intent or whereby his creditors might be defeated; and in *Mogg v. Clark*, 1885, 16 Q. B. D. 79, the words "rated or assessed" in the Metropolis Management Act, 1855, were construed as "rated and assessed" (see, also, *Waterhouse v. Keen*, 1825, 6 Dow. & Ry. 257). But it is only permissible to construe an Act of Parliament in such a manner where it is absolutely necessary to give a reasonable construction to the Act (see *In re Huggins*, 1889, 22 Q. B. D. 277, decided under sec. 28 (2) of the Bankruptcy Act, 1883; *Mersey Docks v. Henderson*, 1888, 13 App. Cas. 595; *Prim v. Smith*, 1888, 20 Q. B. D. 643; *Bishop Auckland Local Board v. Bishop Auckland Iron Co.*, 1882, 10 Q. B. D. 138; *Green v. Wood*, 1845, 7 Ad. & E. N. S. 178; *Harrington v. Ramsay*, 1853, 8 Ex. Rep. 879; *R. v. Pocock*, 1846, 8 Ad. & E. N. S. 729; *Oldfield v. Dodd*, 1853, 8 Ex. Rep. 578; *Malton Board of Health v. Malton Manure Co.*, 1879, 4 Ex. D. 302; cp. *G. W. Rwy. Co. v. Bishop*, 1872, L. R. 7 Q. B. 550).

In the *Metropolitan Board of Works v. Steed*, 1881, 8 Q. B. D. 445, the word "or" in sec. 98 of the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102), was construed as "nor," in order to give a reasonable interpretation to the section.

An agreement that goods shall be shipped "during the months of March and (or) April" means during either or both of those months (*Bowes v. Shand*, 1877, 46 L. J. Q. B. 561).

Oral Pleading.—On the first establishment of the King's Courts, the claim of the plaintiff or demandant and the defence of the defendant

were made verbally in Court by the parties or their respective advocates. The statement of the plaintiff was entitled "narratio," "conte," or "tale"; the second of these survives still as a count in an indictment, and in a Mayor's Court declaration. "It is a formal statement bristling with sacramental words, an omission of which would be fatal" (Pollock and Maitland, vol. ii. p. 602). In a civil action commenced by writ it was absolutely necessary that the plaintiff's count should not depart by a hair's breadth from the language of the writ, or there would be a variance, which would offer to the defendant an opportunity of objection.

The defendant's "plea" had to deny or "defend" the count word for word; but as up to quite recent times a defendant was restricted to one defence, the custom was for the defendant's counsel to raise verbally any objection in law which he felt inclined to take; and, according as the Court appeared inclined to sustain it or not, to abide judgment on it, or to abandon it, and then take another objection in the same manner, or else to "defend" or deny the allegation or "suggestion" of the plaintiff. In the *Year-Book* of 16 Edw. III. (pp. 14, 16 of Mr. L. O. Pike's translation), an instance will be found which will illustrate the manner of proceeding. A longer specimen of verbal pleading will be found in Reeves and Finlason's *History of English Law*, vol. ii. pp. 219-223.

During the continuance of this verbal debate between the parties or their advocates, the officer of the Court was occupied in transcribing the effect of the allegations of the parties, and the acts of the Court, on a Parliament roll, which was called the "record." "As the suit proceeded, similar entries were made from time to time, each successive entry being called a 'continuance'; and when complete, the roll was preserved 'as a perpetual, intrinsic, and exclusively admissible testimony of all the judicial transactions' which it purported to record."

Lest any error or "misprision" of the clerk should vitiate the process, a Statute, 14 Edw. III. stat. 1, c. 6, was passed, directing that if the clerk wrote a letter or a syllable too much or too little, "it shall be hastily amended in due form without giving advantage to the party that challengeth the same because of such misprision." By the Statute 9 Hen. V. stat. 1, c. 4, this direction to amend was extended to defects discovered after judgment. While if it was the advocate who made a slip, he was allowed to say "jeo fails," and amend (Stephens, *Com.*, 7th ed., vol. iii. p. 563).

It will be observed that to the present day this system of pleading survives in criminal proceedings so far as relates to the plea of the accused. His plea, whether "guilty," "not guilty," "autrefois acquit (or convict)," is made by him verbally, and entered on the record by the clerk of the Court.

The first inroad on this system of oral pleading was a custom which arose of each advocate in his turn borrowing the roll or record from the officer of the Court, and himself entering his count or plea respectively thereon. Finally, the practice came to be that the pleadings were drawn and interchanged between the parties, and when an issue had been arrived at, these pleadings were transcribed or "entered" on to the record. Apparently by 1429 written pleadings had been introduced, as the Statute 8 Hen. VI. c. 12, s. 2, mentions "record, process, word, plea."

Blackstone (*Com.* vol. iii. ch. xx. [293]) says that "in consequence of this verbal origin of pleading," in our law French, "the pleadings are frequently denominated 'the parol.'"

In the island of Jersey this system of oral pleading may be observed in full exercise. The plaintiff's advocate states the nature of his claim verbally to the Court, the defendant's advocate requires that his opponent do reduce

his claim to writing, which the plaintiff's advocate does there and then, and hands it in to the greffier or officer of the Court. The defendant's advocate then makes his objections in law and fact one by one, which are also so reduced to writing, and dealt with seriatim by the Court. If all his objections are swept away, he finally demands that the plaintiff be put to proof, which is granted or not by the Court, according to whether the plaintiff's case stands uncontradicted or contradicted on the writings. If proof is not granted, the respective advocates address the jurors there and then on the question of damages.

[*Authorities.*—Blake Odgers, *Principles of Pleading*, 1877; Pollock and Maitland, *History of English Law*; Reeves and Finlason, *History of English Law*; *Year-Books*; etc.]

Order and Disposition.—The doctrine whereby property in the reputed as well as the actual ownership of a bankrupt is liable to satisfy the claims of his creditors, is founded on estoppel and is very old, appearing as early as the Statute 21 Jac. I. c. 19. Property in the order and disposition of the bankrupt (which, though not as a fact belonging to him, is available to satisfy his creditors) means, however, such property only as is permitted by the true owner to be dealt with as property of the bankrupt; and it is only under such circumstances that the principle of estoppel, the foundation of the doctrine, applies. The Courts, in construing the early Acts, put this restricted meaning on the words “order and disposition,” and the restriction is recognised by the Bankruptcy Act, 1883, which enacts that all goods being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt in his trade or business *by the consent or permission of the true owner* under such circumstances that he is the reputed owner thereof, shall be available for payment of his debts. But things in action other than debts due or growing due to the bankrupt in the course of his trade or business are not to be deemed goods within the meaning of the section.

The general law on the subject has already been dealt with under BANKRUPTCY (*q.v.*), and we propose here to confine ourselves to considering the most important effects of the section of the Act alluded to, omitting further reference to the doctrine of reputed ownership as it existed previously to the Act of 1883.

First, by the words “goods in his trade or business,” the compass of the doctrine has been narrowed considerably. Chattels real, fixtures, and growing crops, whether used in the bankrupt's trade or business, are excluded from the doctrine by the word *goods*, and the words *in his trade or business* exclude all chattels other than trade or business chattels. Accordingly household furniture and effects are excluded from the clause, unless it be the furniture of a lodging-house keeper, in which case the furniture is in fact a trade chattel (*Ex parte Official Receiver, In re Harrison*, 1892, 10 Mor. Bky. 1). The words “trade or business” must be widely interpreted; “traders” is defined in the Act of 1869, but the list therein given must not be considered an exhaustive one, *e.g.* the case above quoted—a lodging-house keeper who does not provide board—is not expressly mentioned in the long list of traders the word “trader” is stated to include.

As to what are things in action, see CHORES IN ACTION. “Debts due or accruing due to the bankrupt” include, besides book debts in the ordinary sense of the term, instalments due under a hiring agreement (*Ex parte Rawlings, In re Davis*, 1889, 37 W. R. 142; 60 L. T. 156), and, generally, any

existing debt irrespective of the time at which the same is payable. All these, so long as they are trade or business debts, are within the "order or disposition" clause; but the debts must be existing and not contingent only at the date of the bankruptcy (*Ex parte Kemp, In re Fastnedge*, 1878, L. R. 9 Ch. 383).

The possession order or disposition may be constructive as well as actual, and possession by a bailee or servant of the bankrupt is his possession.

The question of what is "reputed ownership" and "consent of the true owner" requires more detailed examination. The principle of the enactment and the older law that it incorporates is to prevent credit being obtained by a trader by an apparent ownership which the true owner of the property permits him to assume, and it is owing to such permission, and the credit given on the faith of the ownership allowed by such permission, that the true owner is estopped from denying as against the bankrupt's creditors that the property is the bankrupt's; this is the reasoning and process by which property not the bankrupt's becomes liable for his debts. And the principle is extended to book debts, because to confine it to cases in which there is a visible ownership would be inconsistent with the object of the enactment, "for credit may be got as readily upon property in which there is not as upon property in which there is a visible ownership." . . . "The plain object of the statute is that the true owner shall not permit the order and disposition to remain with the bankrupt; and if he does not take the steps which are necessary to prevent it, surely he must be taken to permit it" (per Turner, L.J., in *Bartlett v. Bartlett*, 1857, 1 De G. & J. 127, 140, dealing with an earlier Bankruptcy Act, quoted by Stirling, J., in *Rutter v. Everett*, [1895] 2 Ch. 872, 877, as applicable equally to the Act of 1883).

Whether the bankrupt is the reputed owner is a question of fact. The principles on which the question of fact is to be determined have been frequently laid down (cp. *Ex parte Watkins*, 1878, L. R. 8 Ch. 520, judgment of Lord Selborne, quoted in *Colonial Bank v. Whinney*, 1886, 11 App. Cas. 426). If a man sells goods, and continues in possession of them, this is a *prima facie* case of reputed ownership; but there is no inflexible rule of law to that effect. But it is enough for the doctrine if the goods are in "such a situation as to convey to the minds of those who know their situation the reputation of ownership, that reputation arising by the legitimate exercise of reason and judgment on the knowledge of those facts which are capable of being generally known to those who choose to make inquiry on the subject. . . . So, on the other hand, it is not at all necessary in order to exclude the doctrine of reputed ownership to show that every creditor, or any particular creditor, or the outside world who are not creditors, knew anything whatever about particular goods one way or the other."

And judges have repeatedly expressed the desirability of, so far as is consistent with rules of law, interpreting the law so as to accord with customs of trade. Accordingly, not only will the presumption of reputed ownership be excluded by actual facts, *e.g.* where a manufacturer agent is known to trade as such, but also by evidence of reasonable custom of trade with which ownership would be inconsistent. The custom may be proved either by reported cases, or by evidence of it as on a question of fact. As to hiring agreements, the custom of hotel keepers holding their furniture on hire is now so well established that the Court will take judicial notice of it (*Crawcour v. Salter*, 1881, 18 Ch. D. 30). So a custom of a trade to consign goods on sale or return is a notorious trade custom (*In re Florence, Ex parte*

Wingfield, 1878, 10 Ch. D. 591). In each case the custom, if not notorious, must be sufficiently proved. Cp. *In re Hill*, 1875, 1 Ch. D. 503 n. (alleged custom of coachbuilders to supply cabs on hire system—not proved, and goods therefore within the clause), and *In re Blanshard*, *Ex parte Hattersley*, 1878, 8 Ch. D. (custom to let pianos on hire system sufficiently proved). For other customs, see title BANKRUPTCY, vol. i. p. 511.

A demand by the true owner determines his consent or permission, and takes the goods out of the order and disposition of the bankrupt. In the case, however, of book debts, these being choses in action, in order to take them out of the reputed ownership of an assignor, the assignee must give notice to the debtors, and take every step in his power to obtain possession of the debts (*Rutter v. Everett*, [1895] 2 Ch. 872). And although from the absence of notice a consent on the part of the true owner might be inferred, the inference will nevertheless be rebutted if his failure to obtain possession of the debt is not due to his own fault (*loc. cit.*, p. 881, and see cases there cited).

The consent of the true owner need not be actual, but may be implied from conduct amounting to acquiescence. But no consent can be imputed to the true owner if he is under a disability, or unless he has knowledge of or means of knowing the bankrupt's interest (*In re Rawbone*, 1857, 3 Kay & J. 478; *In re Mills*, [1895] 2 Ch. 564). The grantee of a bill of sale who allows the grantor to continue in possession of goods under such circumstances as to be the reputed owner thereof, consents within the meaning of the section. The Bills of Sale Acts in no way alter the possession of the grantor so as to make it a possession by virtue of the Acts rather than a possession by the consent and permission of the true owner (*In re Ginger*, *Ex parte London and Universal Bank*, [1897] 2 Q. B. 461).

As to the expression *true owner*, the recent decision in *In re Mills*, [1895] 2 Ch. 564, may be noticed, namely, where trustees named in a settlement never executed or had knowledge of the settlement, or, on being informed of it, do not accept the trusts, the beneficiaries and not the trustees are the "true owners" for the purpose of giving the necessary "consent and permission" to the property being in the order and disposition of the settlor "as reputed owner" at the commencement of his bankruptcy, available for his creditors. Such consent and permission can only be effectually given by the beneficiaries when they are persons capable of giving it, and not, *e.g.*, infants or married women restrained from anticipation. See *supra*, on consent implied by conduct.

Order, Final.—The law as to final orders is discussed in the article ORDERS, *infra*, at pp. 311, 312.

Order XIV.—See SUMMARY JUDGMENT.

Order in Council.—The Orders made by the Queen in Council are dated "At the Court at —, [date]. Present, the Queen's Most Excellent Majesty [names of Councillors present]." After reciting the Act of Parliament under which it is made, or the report of the Committee of Council to which the matter has been referred, the terms of Her Majesty's Order are stated; and the executive or judicial officers who are to carry it out, and all other persons whom it may concern, are directed to take notice

of the Order, and to govern themselves accordingly. Some Orders in Council are published in the *Gazette* (*q.v.*); others are issued from the Council Office to the authorities and parties concerned. An Order which is merely negative is not usually issued. Thus, for example, an Order which simply dismisses a petition for leave to appeal is not issued; but if the petitioner is directed to pay the respondent's costs of opposing the application, the Order is issued.

By the Documentary Evidence Acts of 1868 and 1882, *prima facie* evidence of an Order in Council may be given by producing a copy of the *Gazette*, or a copy of the Order purporting to be printed by the Government printer, or a copy or extract certified by the Clerk of the Council or other certifying officer named in the Acts. In some cases the Order is conclusive evidence of the scheme or arrangement which it confirms (see Taylor on *Evidence*, 9th ed., ii. 1094).

Of the matters dealt with in the Queen's Orders the most important are : (1) Treaties with foreign Powers, extradition, international copyright, etc.; (2) constitution of colonial Governments and Courts, etc.; (3) appeals to Her Majesty in Council; Orders of reference to the Judicial Committee, Orders affirming or discharging the judgments appealed from, etc.; (4) Orders for the formation and alteration of local areas for civil and ecclesiastical purposes; (5) Orders confirming schemes of the Ecclesiastical Commissioners, the Charity Commissioners, etc., for the better management of endowments; (6) regulations of the public departments.

[*Authorities*.—See the article PRIVY COUNCIL; and the General Summary prefixed to the *Index to the London Gazette*, 1830-1883.]

Order of Discharge.—See vol. i. p. 526.

Order of the Garter is one of the most ancient and illustrious of the military Orders of knighthood in Europe, and was founded by King Edward III. The precise year of its institution has been disputed, though all authorities agree that it was established at Windsor after the celebration of a tournament. Walsingham and Fabyan give 1344 as its date; Stone, who according to Ashmole is corroborated by the statutes of the Order, says 1350. Selden fixes, as the foundation of this Order, St. George's day, in the eighteenth year of King Edward III., and this statement is corroborated by Froissart. The precise cause of the origin or formation of the Order is likewise not distinctly known. The common story respecting the fall of the Countess of Salisbury's garter at a ball, which was picked up by the king, and his retort to those who smiled at the action, *Honi soit qui mal y pense*, which afterwards became the motto of the Order, is not entirely given up as fable. Although this anecdote has been characterised by some as an improbable fable, yet it is strictly in accordance with the romantic habits of an age when devotion to women was one of the first duties of knighthood. A garter has always been united with sentiments of gallantry, and to wear a lady's favour, her glove, her ribbon, or anything which belonged to her, was in those days a common practice.

The Order was originally composed of twenty-five knights and the sovereign (who nominates the other knights), twenty-six in all. This number received no alteration till the reign of George III., when it was directed that princes of the royal family and illustrious foreigners on whom the honour might be conferred should not be included. These extra knights

have always become part of the twenty-five Companions, on the occurrence of vacancies.

The officers of the Order are: the Prelate, the Bishop of Winchester; the Chancellor, the Bishop of Oxford; the Registrar, the Dean of Windsor; the Garter Principal King-of-Arms; and the Usher of the Black Rod.

The habit and insignia of the Order are as follows:—

(1) The garter, of dark blue ribbon edged with gold, bearing the motto "*Honi soit qui mal y pense*" in golden letters, with buckle and pendant of gold richly chased, is worn on the left leg below the knee.

(2) The mantle is of blue velvet, lined with white taffeta; on the left breast the star is embroidered.

(3) The hood is of crimson velvet.

(4) The surcoat is likewise of crimson velvet, lined with white taffeta.

(5) The hat is of black velvet, lined with white taffeta; the plume of white ostrich feathers, in the centre of which a tuft of black heron's feathers, all fastened to the hat by a band of diamonds.

(6) The collar, gold, consists of twenty-six pieces, each in the form of a garter, enamelled, azure, and appended thereto.

(7) The George, or figure of St. George on horseback, encountering the dragon. The George is worn to the collar; and the lesser George, pendent to a broad dark blue ribbon, on the left shoulder.

(8) The star, of eight points silver, has upon the centre the Cross of St. George, gules, encircled with the garter.

When Queen Anne attended the thanksgiving at St. Paul's in 1702, and again in 1704, she wore the garter set with diamonds, as sovereign of the Order, tied round her left arm.

Order of the Guelphs-Hanover.—This Order was instituted on 12th August 1815, to commemorate the raising of Hanover into a kingdom. The kings of England being also kings of Hanover, the Order was often conferred upon British subjects; but when, on the accession of Queen Victoria in 1837, the two kingdoms became separated, the Order thenceforth became entirely a foreign one. The Order consisted of the King of Hanover as Sovereign and Grand Master, and of three classes of knights not limited in number—Knights Grand Cross, Knights Commanders, and Knights, each class being also subdivided into civil and military divisions.

The officers of the Order were: the Chancellor, Vice-Chancellor, Secretary, and King-of-Arms (Haydn's *Book of Dignities*).

See KNIGHTHOOD.

Orders.—The term order is applied to a decision or direction of the Court given and obtained in one of the summary methods provided for securing relief. Thus every such decision or direction obtained on motion, petition, or summons, is termed an order.

Order distinguished from Judgment.—By the Rules of the Supreme Court, 1883, it is provided that every order of the Court or a judge in any cause or matter may be enforced in the same manner as a judgment (Order 42, r. 24). But it has been judicially decided that the distinction between judgments and orders still remains. The question has been discussed in several cases under sec. 4 (g) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), where attempts have been made to uphold bankruptcy notices founded on orders as coming within the term "final judgment" used

in the section. Thus in *Ex parte Chinery, In re Chinery*, 1884, 12 Q. B. D. 342, Cotton, L.J., said: "In legal language and in Acts of Parliament, as well as with regard to the rights of the parties, there is a well-known distinction between a "judgment" and an "order." No doubt the orders under the Judicature Act provide that every order may be enforced in the same manner as a judgment, but still judgments and orders are kept entirely distinct. It is not said that the word "judgment" in other Acts of Parliament includes an "order." And to the same effect Bowen, L.J., in the same case: "There is an inherent distinction between orders and judgments. It is true that certain Acts of Parliament have given to orders the effect of judgments, but the distinction between them remains." So, in *In re Riddell, Ex parte Earl of Strathmore*, 1888, 20 Q. B. D. 512, Fry, L.J., insisted on the same thing: "I think the distinction between judgments and orders is still an existing one." Thus, too, in *Onslow v. Commissioners of Inland Revenue*, 1890, 25 Q. B. D. 465, it was said, with regard to the rules relating to appeals, that a judgment is a decision obtained in an action, and every other decision is an order. In *Ex parte Whinney, In re Sanders*, 1884, 13 Q. B. D. 476, Cave, J., after pointing out that where there is a judgment the Court makes use of the words "adjudge" or "decree," not "order," expressed the view that "when it is said that an order may be enforced as a judgment, this makes it clear that an order is not a judgment." See also the following cases:—*Ex parte Schmitz, In re Cohen*, 1884, 12 Q. B. D. 509; *Ex parte Moore, In re Faithfull*, 1885, 14 Q. B. D. 627; *In re Henderson, Ex parte Henderson*, 1888, 20 Q. B. D. 509; *In re Bimstead, Ex parte Dale*, [1892] 1 Q. B. 199; *In re Alexander, Ex parte Alexander*, [1892] 1 Q. B. 216; *In re A Bankruptcy Notice, Ex parte The Official Receiver*, [1895] 1 Q. B. 609. Notwithstanding these decisions, however, it must not be forgotten that certain orders have all the effect of judgments. Thus, to take a very familiar instance, an order for administration can be obtained in proceedings commenced either by writ or by originating summons. In the one case the technical description for such an order, which is made in Court, is an administration "judgment"; in the other, where it is made in chambers, it is termed an administration "order." In either case the form and effect of the order is, except in mere formal particulars, precisely the same.

Interlocutory and Final Order.—Orders are either interlocutory or final. This distinction is mainly of importance in consequence of the rules under the present practice with regard to appeals. It is provided by sec. 12 of the Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77), that every appeal to the Court of Appeal shall, where the subject-matter of the appeal is a *final* order, decree, or judgment, be heard before not less than three judges of the said Court sitting together, and shall, when the subject-matter of the appeal is an *interlocutory* order, decree, or judgment, be heard before not less than two judges of the said Court sitting together. Any doubt which may arise as to what decrees, orders, or judgments are final and what are interlocutory, is to be determined by the Court of Appeal.

Time for Appeal.—The time for appealing varies according to the nature of the order appealed from, one principal test being whether such order is final or interlocutory. For it is provided that no appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Court of Appeal, be brought after the expiration of fourteen days, and no other appeal, except by such leave, after the expiration of three months. Such respective periods are calculated, in the

case of an appeal from an order in chambers, from the time when the order was pronounced, or when the appellant first had notice thereof, and in all other cases, from the time at which the judgment or order was signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal (Order 58, r. 15).

The time for appealing from any order or decision in a winding-up or bankruptcy, or in any other matter not being an action, is the same as that limited for an appeal from an interlocutory order (Order 58, r. 9).

Length of Notice.—Not only does the time for bringing an appeal depend upon the nature of the order appealed from, but the same consideration governs the question as to the length of notice of appeal which is required to be given. For notice of appeal from any judgment, whether final or interlocutory, or from a final order, is a fourteen days' notice, whilst notice of appeal from any interlocutory order is a four days' notice (Order 58, r. 3).

What is a Final Order.—The above provisions regulating the time for appealing from final and interlocutory orders appear to contemplate two classes of orders—final orders which determine the rights of parties, and orders which do not determine the rights (per Jessel, M. R., *In re Stockton Iron Furnace Co.*, 1879, 10 Ch. D. p. 349). In determining whether an order is final or interlocutory, the test to apply is whether such order amounts to a final decision on the merits (*In re Compton, Norton v. Compton*, 1884, 27 Ch. D. 392). For no order, judgment, or other proceeding can be final which does not at once affect the status of the parties for whatever side the decision may be given; so that, if it is given for the plaintiff it is conclusive against the defendant, and if it is given for the defendant it is conclusive against the plaintiff (per Brett, L.J., *Standard Discount Co. v. La Grange*, 1877, 3 C. P. D. p. 71). A final order is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation (*Salaman v. Warner*, [1891] 1 Q. B. 734). See also *Collins v. Vestry of Paddington*, 1880, 5 Q. B. D. 368; and the cases cited under Order 58, r. 15, *Annual Practice*, 1898, p. 1047.

In this connection it may be stated that, on an appeal from an interlocutory order, further evidence may be given without leave (Order 58, r. 4). See on this point *In re Compton, Norton v. Compton*, 1884, 27 Ch. D. 392).

Order in any Matter not being an Action.—It has been decided that an originating summons taken out under Order 55, r. 3, is a civil proceeding commenced otherwise than by writ in manner prescribed by a rule of Court, and is consequently an action within the definition of that word in sec. 100 of the Judicature Act, 1873. Therefore an order made upon such a summons is appealable at any time within three months from its date (*In re Fawsitt, Galland v. Burton*, 1885, 30 Ch. D. 231).

Order Nisi.—An order *nisi* is one directing a particular act to be done, unless the party directed to do such act shall by a time specified in the order show cause to the contrary. Such an order is obtained *ex parte*, and is served upon the party against whom it is directed. The order is subsequently made absolute, if the Court, after hearing both parties, should be of opinion that a case is made out. Garnishee and charging orders are familiar instances of this procedure. In one case, indeed, an order *nisi* is made, not *ex parte*, but on notice; for in foreclosure proceedings the form of judgment or order is invariably *nisi* in the first instance, and is made after hearing both parties. The defendant, however, need not be served with

notice of an application to make the order absolute, where he has failed to redeem on the day fixed by the Master's certificate for that purpose.

In the Common Law Courts orders (or, as they were there termed, rules) *nisi* were under the old practice of very common occurrence. The effect of Order 52, r. 2, has been to greatly diminish the number of such applications, for it is thereby provided that no application for a rule *nisi* in order to show cause shall be made in any action, or (a) to set aside, remit, or enforce an award, or (b) for attachment, or (c) to answer the matters in an affidavit, or (d) to strike off the rolls, or (e) against a sheriff to pay money levied under an execution. See as to the practice with regard to rules *nisi*, Chitty's *Archbold's Practice*, pp. 1386-1395. It may be noticed that under sec. 100 of the Judicature Act, 1873, "order" includes "rule."

Orders of Course.—Orders of course (which are confined to the Chancery Division) are obtained *ex parte* on petition or motion, though the former is the more usual mode of application. Such, for instance, is the common order to tax a solicitor's bill, which is made on petition of course, or an order for foreclosure absolute, which is obtained by motion of course in cases where the application for the purpose is made in Court.

If an order of course be irregularly obtained, or if there has been want of good faith to the Court, as by suppression of material facts, it will be discharged, and that without discussion of the merits (*Harris v. Start*, 1838, 4 Myl. & Cr. 261; *Victor v. Devereux*, 1843, 6 Beav. 584; *Holcombe v. Antrobus*, 1845, 8 Beav. 405; *De Feuchères v. Daves*, 1843, 11 Beav. 46; *Bidder v. Bridges*, 1884, 26 Ch. D. 1). "There are few things more important than that parties who apply for orders of course should fairly state all the circumstances which really ought to be considered" (per Lord Langdale, M. R., *Victor v. Devereux* (*ubi supra*)).

Orders of course made on petition are now drawn up, passed, and entered under the directions of the registrars of the Chancery Division (Order 62, r. 18).

Four-Day Order.—Where a party has been ordered to do a certain act, but has neglected to comply with the order, and no time has been limited within which the act should be done, it is common practice for a supplemental order to be made, which fixes a time for the doing of the act ordered to be done, and upon proof of service of such order and of continued disobedience, the party having carriage of the order is in a position to enforce it by such process of execution as is applicable to the particular case. Such an order is termed a four-day order (see *Needham v. Needham*, 1842, 1 Hare, 633; *Gilbert v. Endeau*, 1878, 9 Ch. D. 259). The practice is apparently confined to the Chancery Division (*Hulbert v. Cathcart*, [1894] 1 Q. B. 244). The modern four-day order appears to be a survival of a very old practice of the Courts of Chancery, under which, where a party had disobeyed an order directing an act to be done, a notice of motion was served for an order that he should perform the act within four days, or stand committed. If, after being served with such order, he should still be contumacious, an order for his committal could be obtained on motion of course (Sidney Smith's *Chancery Practice*, 7th ed., 1862, p. 222).

Orders made in Chambers.—Orders made in chambers in the Chancery Division are drawn up by the registrar where they are to be acted on by the Paymaster-General. Every other order is drawn up in chambers, unless the judge otherwise directs (Order 55, r. 74). Under the direction of the several judges of the Chancery Division, the orders drawn up in chambers are confined to orders made in matters of procedure.

Orders to be acted on in Pay Office.—As to the rules relating to the

preparation of orders in the Chancery Division and in Lunacy to be acted upon by the Paymaster, see Supreme Court Funds Rules, 1894, rr. 5-27.

Minutes of Order.—In the Chancery Division, “in their preliminary stage,” judgments or orders (or rather the substantive part of them) are ordinarily drawn up in “minutes,” *i.e.* in a comprehensive form, eschewing details, and indicating the nature of the directions given by the Court. These minutes are subsequently expanded, under the supervision of the Registrar, into the complete order (Seton, p. 6).

Where there is any question as to the form of the order, and whether the minutes correctly represent the order actually made by the Court, an application may be made by the party dissatisfied, by motion, on notice, to vary the minutes (*General Share and Trust Co. v. Wetley Brick and Pottery Co.*, 1882, 20 Ch. D. 130). See Seton, pp. 164, 165.

See APPEAL; CHAMBERS—CHANCERY DIVISION; EXECUTION; JUDGMENT; MOTION; PAY OFFICE; PETITION. As to General Orders (*Regulæ Generales*), see RULES OF COURT.

[*Authorities.*—*The Annual Practice*, 1898; Chitty's *Archbold's Practice*, 14th ed., 1885; Daniell's *Chancery Practice*, 6th ed., 1882; Seton's *Judgments and Orders*, 5th ed., 1891.]

Orders, Holy.—See HOLY ORDERS.

Ordinance.—According to Coke (4 *Inst.* 25), an Act of Parliament requires the consent of the Lords, the Commons, and the King; an ordinance in Parliament wanteth the threefold consent, and is ordained by one or two of them. In modern times the term “ordinance” is used to signify a rule or body of rules enacted by an authority less than sovereign. The Ordinances of Labuan or Lagos, for example, are acts of legislation; the fact that the Legislature consists of the governor acting alone or with a small nominated council does not alter the legal character of the rules made. An ordinance made by the Queen, constituting a new office or a new order of knighthood, is an executive act.

The *Ordonnances* made by the kings of France before 1789 were acts of legislation, though some maintained that the king had usurped the legislative authority which belonged properly to the States-General of the kingdom. See the article FRENCH LAW.

Ordinary; Ordinarius (a word received from the civil law).—*Judex ordinarius* is a judge who has regular jurisdiction as of course and of common right in opposition to persons who are extraordinarily appointed. The Crown is the supreme ordinary, but the term is usually applied to a bishop, he having ordinary jurisdiction in ecclesiastical matters. And see JUDGE ORDINARY.

Ordinary Calling.—The Lord's Day Observance Act (29 Car. II. c. 7), s. 1, provides, *inter alia*, that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's day (works of necessity and charity alone excepted). It is not in the exercise of his ordinary calling, within the meaning of this statute, for a farmer to

hire out his stallion to cover a mare (*Scarfe v. Morgan*, 1838, 4 Mee. & W. 270); or for a farmer to enter into a contract of service with a labourer (*R. v. Whitnash*, 1827, 7 Barn. & Cress. 596); or for a tradesman to give a guarantee to another tradesman for the faithful services of a proposed traveller (*Norton v. Powell*, 1842, 4 Man. & G. 42); or for a soldier to enlist recruits (*Walton v. Gavin*, 1850, 20 L. J. Q. B. 73); or for an auctioneer to sell goods by private contract (*Drury v. Defontaine*, 1808, 1 Taun. 131); or for a solicitor to enter into an agreement, in which he makes himself personally liable, for the purpose of settling a client's affairs (*Peate v. Dicken*, 1834, 1 C. M. & R. 422); or for a banker, or any other person than a horsedealer, to sell a horse (*Drury v. Defontaine*, *supra*; as to a horsedealer, see *Fennell v. Ridler*, 1826, 5 Barn. & Cress. 406).

A pledge by a trader of stock-in-trade which he has bought on credit and not paid for, is not "a transfer in the ordinary course of his trade or calling" within the exception contained in sec. 4 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31) (*In re Hall*, 1884, 14 Q. B. D. 386).

Ordinary Course of Post.—Where it is provided that a notice may be served, by posting it so that it will, in the ordinary course of post, be delivered on or before a certain date at the place of abode of the person to be served, "ordinary course of post" means the general course of post with regard to the delivery of letters to persons resident in the district, without taking into consideration any special regulations with respect to delivery to particular persons. Thus where notices of objection under the Act of 6 & 7 Vict. c. 18, ss. 17 and 100, were posted, addressed to barracks in which the voters resided, and, according to the military and postal regulations, letters addressed to the barracks were collected from the post office by orderlies, instead of being delivered by the post office, it was held that the notices must be deemed to have been given on the day on which they would have been delivered by the post office at the barracks if there had been no special arrangement as to persons living in barracks (*Kemp v. Wanklin*, [1894] 1 Q. B. 583—overruling *Childs v. Cox*, 1887, 20 Q. B. D. 290; see also *Hudson v. Louth*, 1879, L. R. 6 Ir. 69). The "ordinary course of post," of which evidence must be given, must, however, include and cover the transit from the post office to the place of abode in the address, and it must be shown how much time the transit ordinarily requires. If the place of abode is a long way from the nearest post office, and the delivery of letters at such place is casual and uncertain, it is not sufficient to show that the notice would, in the ordinary course, reach the post office within the time appointed (*Lewis v. Evans*, 1874, 44 L. J. C. P. 41; *Doogan v. Colquhoun*, 1886, L. R. 20 Ir. 361).

Ordination.—Ordination consists in the laying on of hands by the bishop in the case of persons called to HOLY ORDERS, with a proper form of prayer. No bishop can be obliged to confer Holy Orders. See further, articles DIMISSORY LETTERS; HOLY ORDERS; INCUMBENT.

Ordnance Board or Office.—Until the year 1855 the Board of Ordnance was the department of State charged with the care of Crown fortresses and their armaments, of garrisons, and stores.

In the reign of Charles II. it was charged with providing armament for

the ships and forts, and bound equally to obey the Lord Admiral and the Lord Treasurer.

The navy in early times was more closely connected with the Board than the army was; but the army subsequently acquired possession of the Ordnance Department, and provided, as it still does through the War Department, all armaments and warlike stores, munitions, and equipments for the navy. The manufacture by the Board in its own factories at Woolwich and elsewhere of guns and carriages, small-arms, and powder, did not begin till the reign of George I.

The Master-General of the Ordnance was president of the Board, and even after the regular appointment of the commander-in-chief (*q.v.*) was, down to 1828, in the Cabinet, and the chief adviser of the Crown in military matters. He was the commander of the scientific corps of the artillery and engineers.

The Board was not under the control of the Secretary at War, but presented its own estimates to Parliament, and was responsible for the expenditure of the money voted by it. The Board officers were naval, military, or civilian; two of them had seats in Parliament; and each was responsible for his own department.

The constitution and functions of the Board accounts for the duties being placed upon it of making the authoritative survey of the United Kingdom, known as the Ordnance Survey (*q.v.*). It was also in charge of the Geological Survey (*q.v.*) until 1845.

The Ordnance Board Transfer Act, 1855 (18 & 19 Vict. c. 117), transferred its powers to the War Department (*q.v.*).

See ADMIRALTY; FORTIFICATIONS.

[*Authorities*.—Clode, *Military Forces of the Crown*, chs. i., xx.; Anson, *Law of the Constitution*, 2nd ed., p. 376.]

Ordnance Survey.—The survey of the United Kingdom, being originally connected with its military defence, was intrusted to the Ordnance Board (*q.v.*) about the middle of the eighteenth century. In 1841 the Ordnance Survey Act (4 & 5 Vict. c. 30) was passed to authorise and facilitate the completion of the Survey of Great Britain and the Isle of Man. A separate Act related to Ireland.

For the purpose of carrying out the survey, justices at Quarter Sessions for any county, upon application in writing of a duly appointed officer of the Board of Ordnance, now of the Board of Agriculture, advertised in the county newspapers, nominate one or more persons to aid and assist in the examination and marking out of the reported boundaries of counties, cities, boroughs, etc., and to act under such survey officer as he may direct.

The officers of the survey are empowered, after notice in writing to the owner or occupier, to enter into any premises for the purpose of making and carrying on the survey, and fixing marks or objects to be used in the survey, at any reasonable time in the day, until the surveying, ascertaining, and marking out of any boundary line is completed.

If it is necessary to fix any mark or object in any walled garden, orchard, or pleasure ground, the authorised officers must give three days' notice, and the occupier may employ any person whom he may think fit to fix it as the officers shall direct.

Satisfaction must be made for all damages, if it is demanded; and in case of dispute between any parties concerned, they are to be ascertained by two justices in petty session, with an appeal to Quarter Sessions.

The clerk of the peace, after notice, must attend, and produce to the survey officer, at any specified place, any books, maps, papers, or other documents in his possession as such clerk, which are required for ascertaining and marking out the boundaries of the county.

Two inhabitants may be required to attend if there is no clerk of the peace, or if he makes default (s. 5). By the definition clause (s. 15) "county" includes all other places, districts, and divisions; and "clerk of the peace," any person executing the duties of clerk of the peace, churchwarden, parochial or any public officer of any county or other division.

The boundaries may be marked out by the putting down of any posts, etc., or by affixing marks on or against any public or private building, as may be thought proper; and any person removing or defacing them is liable to a penalty of not exceeding £10, and not less than £2. The like penalty is prescribed for obstructing the survey.

Persons attending on the survey to point out boundaries are entitled to allowances from the Board for their services; and payments for damages are made by the Board out of moneys provided by Parliament (ss. 9 and 10).

If the persons summoned do not attend, or do not assist the officers of the survey, they are liable to the penalty above stated (s. 11).

By sec. 12 it is provided that the Act shall not affect any boundaries of a county, etc., nor those of any land or property, nor the title thereof (s. 12).

Nor are the Ordnance maps admissible in evidence (*Bidder v. Bridges*, 1886, 54 L. T. 530).

By the Survey Act, 1870 (33 Vict. c. 13), the powers under the Survey Act were transferred from the War Department to the Commissioners of Works.

By the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), they were transferred to that Board.

Organ.—See STREET MUSIC.

Organic Laws—A continental expression to describe laws which organise a State or a public institution, the nearest equivalent to which in English would be charter.

Original Design.—See DESIGNS.

Original Process—The step taken to compel a defendant to appear in an action. See FINAL PROCESS; MESNE PROCESS.

Originating Summons.—This beneficial mode of procedure was introduced by 15 & 16 Vict. c. 86, s. 45, and applied to the simple case of an order for the administration of the personal estate of a dead man (*In re Busfield*, *Whaley v. Busfield*, 1886, 32 Ch. D. 125, and *In re Holloway* (a solicitor), *Ex parte Pallister*, [1894] 2 Q. B. 163 (C. A.)). Its scope was greatly enlarged by Order 55, r. 3, and has since been extended by Order 55, r. 5a, and otherwise. As now defined, an originating summons means

"every summons other than a summons in a pending cause or matter" (Order 71, r. 1*a*, R. S. C., August 1894). Under the earlier definition it meant a summons by which proceedings were commenced without writ (Order 71, r. 1). It is conceived that originating summonses prescribed by the R. S. C., as, for instance, by Order 55, r. 3, are "actions" within the meaning of such rules, and that an appeal against an order made therein must be brought within three months (Order 58, r. 14; and *In re Fawsitt, Galland v. Burton*, 1885, 30 Ch. D. 231, (C. A.)), but that an originating summons under the statutory or general jurisdiction of the Court, *e.g.* under the Vendor and Purchaser Act, 1874, or, in the matter of an infant, is not an action in this sense, and that an appeal from an order made thereon must be brought within fourteen days (Order 58, r. 15; *Annual Practice*, 1898, pp. 1044, 1193). The R. S. C., August 1894, prescribe four different forms of originating summons, namely: (1) A general form of originating summons. This is the common form now issued under Order 55, r. 3, or in any other case where there are a plaintiff and defendant; (2) an originating summons *not inter partes*. This is the common form where there is a respondent but no plaintiff or defendant, as, for instance, a summons for the appointment of new trustees; (3) an originating summons under Order 54, r. 4*f*, in certain special matters where no appearance is required, as, for instance, under the Solicitors Act, 1843; (4) an *ex parte* originating summons, *i.e.* where there is no one to be served with the same, as, for instance, an application on behalf of an infant absolutely entitled, under the Settled Land Acts, for the appointment of "trustees of the settlement," or (in some cases) an application for maintenance of an infant.

The great advantage of this mode of procedure is, that the suitor obtains an early decision from the judge without the expense and delay of pleadings.

The following are the principal cases in which an originating summons is resorted to: (1) Under Order 55, r. 3, where there is any question arising in the administration of an estate or trust to be determined; (2) under rule 4 of the same Order, for administration of the estate of a deceased person, or the administration of a trust; (3) under rule 5*a* of the same Order, for foreclosure or redemption; (4) under rule 9*a* of the same Order, for an order under 27 & 28 Vict. c. 112, to sell a debtor's interest in land delivered in execution; (5) under rule 9*c* of the same Order, under the Finance Act, 1894; (6) under rule 13*a* of the same Order, for the appointment of new trustees, or a vesting order; (7) for the maintenance of infants; (8) under the following Acts of Parliament, namely (*a*) the Lands Clauses Acts; (*b*) the Vendor and Purchaser Act, 1874; (*c*) the Married Women's Property Act; (*d*) the Conveyancing Act, 1881; (*e*) the Settled Land Acts; (*f*) the Mortmain Act, 1891; (*g*) the Judicial Trustees Act, 1896. And in the cases referred to in Order 54, r. 4*f*, as for a solicitor to deliver papers.

The procedure by originating summons is not convenient or desirable where there is a serious dispute of fact (*In re Powers, Lindsell v. Phillips*, 1885, 30 Ch. D. 291 (C. A.)). Whenever wilful default or breach of trust is charged, a writ should be issued, unless the defendant consents to the jurisdiction on originating summons (*Dowse v. Gorton*, [1891] App. Cas. 202).

Under rule 54*a*, R. S. C., Nov. 1893, any Division of the High Court may determine any question of construction arising under a written instrument.

Service.—An originating summons cannot be served out of the jurisdiction (*In re Busfield, Whaley v. Busfield*, 1886, 32 Ch. D. 133), but the difficulty can be overcome if there is a solicitor in this country authorised to appear for a defendant out of the jurisdiction.

Parties.—The question of parties to an originating summons is principally regulated by Order 16, rr. 8, 9, 9a, 32, 40, 41, and 46, and Order 55 r. 5. Two cardinal principles should be borne in mind, namely, (1) that no man's rights ought to be adjudicated upon unless he is represented either directly or indirectly; (2) that the Court is unwilling to decide questions between some only of the parties interested, as such a decision may be no bar to future litigation on the same point between others. Where there are numerous persons having the same interest, the best plan is to make one of each class defendants, leaving the judge either to proceed in the absence of the others, or to appoint a person to represent them under Order 16, r. 9. Some of the judges prefer to adopt the former course. Under Order 16, r. 9a, the Court has power to approve a compromise in the absence of some of the persons interested. In cases of construction, and other cases where an heir, next of kin, or class are interested, and they are not known or difficult to ascertain, the Court may appoint one or more persons to represent them (Order 16, r. 32). To enable a judge to proceed in the absence of any person representing the estate of a deceased person, an Order to that effect is necessary (*In re Richerson, Scales v. Heyhoe*, No. 2, [1893] 3 Ch. 146).

It is usual to apply for a representation order when the summons first comes before the judge or Master. In the chambers of some of the judges the Master will make the order *sub modo*, leaving the judge to confirm it at the hearing.

Female litigants should be described in the heading of the originating summons as spinsters, widows, or married women, as the case may be. Infants sue by next friend, and defend by guardian *ad litem*.

Evidence.—The leading rules and principles of evidence are the same on application by originating summons as in other civil proceedings. The evidence on originating summons is usually taken by affidavit, and is subject to cross-examination; but in cases where the evidence is of so conflicting a character as to necessitate the cross-examination of witnesses, it is better to proceed by writ. Affidavits should be confined to such facts as the witness is able of his own knowledge to prove (Order 38, r. 3); but under Order 30, rule 7, the judge may accept less than strict evidence as to any particular fact; and in applications by trustees, under Order 55, rule 3, where there is no dispute about the facts, statements in the affidavit are not infrequently made on information and belief only. Copies of, or extracts from, documents should not be unnecessarily set forth in an affidavit. Thus in dealing with a will, it is better, as a rule, merely to refer to the probate. If material parts of a will or other written document are set forth in an affidavit, such parts should be stated verbatim in inverted commas. The word "gentleman" is not an insufficient description of a deponent, except in an affidavit of fitness of a proposed new trustee (*In re Dodsworth, Spence v. Dodsworth*, [1891] 1 Ch. 657); but it is better to give the deponent's occupation, as, for instance, solicitor. The deponent should state what facts are within his own knowledge, and what are his means of knowledge, and what are the grounds of his information and belief as to facts not within his own knowledge.

In referring to letters received by a deponent, such letters should be merely made exhibits to the affidavit; but in dealing with letters written by the deponent, it is usual to set forth copies in the affidavit. "You can get the same discovery on a summons as on an information" (per Lindley, L.J., *In re Norwich Town Close Charity Estate*, 1888, 40 Ch. D. 310, and *In re Wills' Trade Marks*, [1892] 3 Ch. 201). But as the procedure by

originating summons is not convenient where there are disputed questions of fact, applications for discovery in proceedings so commenced are rare.

Sometimes a statement of facts is required for the use of the judge. When the question is one of construction, such statement should set out the material parts of the will or other instrument verbatim (see *In re Bence, Smith v. Bence*, 1891, 64 L. T. 282).

Procedure generally.—For the purpose of issuing the summons, two copies are required, one of which must be impressed with a 10s. stamp. Before the summons is sealed, a certificate of no prior application has still to be lodged at the judge's chambers. The summons is served by giving a true copy to the respondent, the original being produced at the same time. Before a respondent can be heard upon the summons, he must, if it requires an appearance, enter such appearance and give notice thereof, in accordance with Order 54, r. 4*c*. On the return of the summons, the Master will enter the evidence, and will, if necessary, appoint a time for closing the same. If the matter be adjourned to the judge in chambers, the parties must state whether or not the application will be attended by counsel. A book is usually kept in the various chambers in which solicitors can enter notice of their intention to appear by counsel. If notice of such intention is not given when the adjournment takes place, the solicitor should give notice of such intention to his opponent.

If a summons requires amendment, unless on the return of it leave to amend is given, an ordinary summons should be taken out for that purpose. Amendments before service can generally be made in the Central Office, without application to the Master.

If the matter is decided by the judge in chambers, the Master indorses a note of the order made on the summons, and the order will be drawn up by the registrar of the day.

An order upon originating summons is, of course, subject to appeal, and may be taken up to the House of Lords.

An unsuccessful litigant in chambers in the Chancery Division has three alternatives: (1) to move before the judge in Court to discharge the order made in chambers; (2) to have the matter adjourned into Court; (3) to obtain the leave of the judge to go direct to the Court of Appeal, upon certificate that no further argument is required (*Annual Practice*, 1898, 1011).

The time within which to move to discharge an order made in chambers is fourteen days (*In re Giles Real and Personal Advance Co. v. Michell*, 1890, 43 Ch. D: 391, and Order 58, r. 14).

Costs.—As a rule, the costs of all proceedings in the Supreme Court, including the administration of estates and trusts, are in the discretion of the Court or judge; but an executor, administrator, trustee, or mortgagee cannot be deprived of his costs, unless he has behaved unreasonably (Order 65, r. 1). Trustees, executors, and administrators are usually allowed their costs as between solicitor and client. In actions for administration or the like, if all parties are before the Court and *sui juris*, and consent, costs are generally allowed as between solicitor and client. By Order 65, r. 14*b*, the costs of inquiries to ascertain the person entitled to any legacy, money, or share, or otherwise incurred in relation thereto, shall be paid out of such legacy, money, or share, unless the judge shall otherwise direct. Subject to the last-mentioned rule, the costs of administration actions are paid out of the general personal estate, *i.e.* in effect, out of the residue, and not out of a lapsed share of personal estate, in exoneration of the general residue (*Fenton v. Wells*, 1877, 7 Ch. D. 33). In the administra-

tion of the real and personal estate, the costs exclusively occasioned by the administration of the real estate, or so far as they have been increased thereby, are thrown upon the real estate (*In re Middleton, Thompson v. Harris*, 1882, 19 Ch. D. 552). If a testator directs that his testamentary expenses are to be paid out of a particular fund, such fund will have to bear the costs of an action for administration in exoneration of the general estate (*Miles v. Harrison*, 1874, L. R. 9 Ch. App. 316). Testamentary expenses includes the costs of an administration suit (*Harloe v. Harloe*, 1875, L. R. 20 Eq. 471).

District Registries.—Originating summonses may be sealed and issued in the district registry of Liverpool and Manchester respectively, and appearances shall be entered in such registry, respectively (R. S. C., May 1887); and, under the Judicial Trustee Rules, 1897, an originating summons may be issued in a district registry.

[*Authorities.*—See further, *Annual Practice*, 1898; CHAMBERS—CHANCERY DIVISION, *ante*, vol. ii. p. 425 *et seq.*; Marcy and Dodd on *Originating Summons*; and Marcy and Prior's *Forms of Originating Summons, and Proceedings connected therewith.*]

Origin, Certificate of.—A statement made by the sender of goods, before a recognised authority in the port of shipment, as to their place of origin.

In most countries, the master of a merchant vessel, before being allowed to unlade, is required to produce a certificate of origin. Before the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), such certificates were required also in Great Britain on all goods imported into England which were entitled to any exemption from or remission of duty or other peculiar advantage. In countries where there is a differential tariff they are a necessary part of the customs machinery. In the case of France there are both a differential tariff and a special duty of fr. 3.60 per 100 kilogrammes, over and above the ordinary duty, upon all goods of extra-European origin coming into France from any port other than a French port. The recognised authority before which the sender of goods must make his statement and obtain the certificate is the French consul at the port of shipment. The same system is followed by most other countries.

Ornamental Grounds.—The most important Acts dealing with the subject are: (1) The Recreation Grounds Act, 1859 (22 Vict. c. 27), facilitating grants of lands to be made near populous places for use as recreation grounds; (2) The Public Improvements Act, 1860 (23 & 24 Vict. c. 30), enabling a majority of two-thirds of the ratepayers of any parish or district duly assembled to rate their district in aid of public improvements for the general benefit of their district, provided one-half of the cost be raised by private subscription; (3) The Town Gardens Protection Act, 1863 (26 & 27 Vict. c. 13), protecting certain gardens or ornamental grounds in cities and boroughs. The Act provides for the freeing from neglect, encroachment, and the like, of gardens and ornamental grounds of fifty years' standing, and the vesting thereof in a corporate authority or committee of rated inhabitants. But the Act applies only to such gardens, etc., as "are set apart otherwise than by revocable permission of owners for use of the inhabitants of a square." See *Tulk v. Metropolitan Board of Works*, 1868, L. R. 3 Q. B. 682 (Leicester Square). See OPEN SPACES.

Ornamental Timber.—The cutting of ornamental timber is a form of equitable waste (see WASTE). The Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, subs. 3, expressly provides that an estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate.

It was early the practice of the Courts to direct the cutting of ornamental timber for the purposes of thinning out and the preservation and improvement of other trees of a more ornamental character; likewise, if the tenant for life (without impeachment of waste) had cut down ornamental timber *bonâ fide* for such purposes of thinning out, etc., the Court considered it to have been rightfully cut (*Lushington v. Boldero*, 1819, 6 Madd. 149; 22 R. R. 26). The law as to the property in the timber cut and the proceeds thereof, where the tenant is subject to impeachment for waste, is concisely stated by Jessel, M. R., in *Honywood v. Honynwood*, 1874, L. R. 18 Eq. 306 at p. 309. If such timber is wrongfully cut, the property in it belongs to the owner of the first estate of inheritance. If it is cut by order of the Court for sufficient reasons, the proper course is to invest the proceeds and pay the income to the successive owners of the estate until there is an absolute estate of inheritance, the owner of which is entitled to the principal.

But where an equitable tenant for life unimpeachable for waste cuts down timber rightfully, viz. where the timber so cut is such that the Court itself would direct it to be cut for the preservation and improvement of the remaining timber, such tenant for life will be entitled to the whole of the proceeds (*Baker v. Sebright*, 1879, L. R. 13 Ch. D. 179). "This doctrine does not necessarily refer to decaying timber that may be ornamental, and which the Court may order to be cut on the balance of convenience, since it orders it when the tenant for life is impeachable for waste in the ordinary course of management, and then the proceeds are invested for the benefit of the estate" (per Jessel, M. R., in *Baker v. Sebright*, *supra*, p. 185).

Nor does it follow that the Court will not, at the instance of the remainderman, grant an injunction restraining the tenant for life from cutting down ornamental timber, which it has become necessary and proper to cut, and direct that the cutting be done under its supervision.

For forms of injunction to stay felling of ornamental timber, and also of an inquiry as to such felling, see Seton on *Judgments*, 5th ed., pp. 471, 472.

As to the measure of Damage for cutting down Ornamental Timber.—The measure is the actual damage done to the inheritance, and it matters not that the cutting is such that, although in no way depreciating the value of the inheritance, it would nevertheless have been restrained by injunction by the Court. Once the ornamental timber has been actually felled, and the reversioner claims damages from the tenant for life, the measure of damages will be the actual damage done to the inheritance (*Bubb v. Yelverton*, 1870, L. R. 10 Eq. 465). In that case, Romilly, M. R., said the question he had to determine was "not at what amount the reversioner might value the damage occasioned to him, but at what amount twelve jurymen would value it; and he, performing the office of the jury, had come to the conclusion that no damage had been done," and consequently dismissed the reversioner's claim. See also as to this, the true measure of damages herein, *Whitham v. Kershaw*, 1885, 16 Q. B. D. 613 (an action for waste by reversioner against tenant).

Ornament; Ornaments Rubric.—The Elizabethan Act of Uniformity (1 Eliz. c. 2, s. 25), which (s. 3) ordered the use of the second Prayer-Book of Edward the Sixth, with certain alterations as therein mentioned, provides—

That such ornaments of the Church and of the ministers thereof shall be retained and be in use as were in this Church of England by authority of Parliament in the second year of King Edward the Sixth, until other order shall be taken therein by the authority of the Queen's Majesty, with the advice of her Commissioners appointed and authorised under the Great Seal of England for causes ecclesiastical, or of the Metropolitan of this realm.

Sec. 26, which must be read with sec. 25, enables the Queen with like consent, in case of any contempt or irreverence in the ceremonies of the Church, etc., to ordain and publish such further ceremonies and rites as may be for the advantage of God's glory, etc.

The following rubric was inserted at the commencement of the Elizabethan Prayer-Book:

And here it is to be noted that the minister, at the time of the Communion and at all other times, in his ministrations shall use such ornaments in the church as were in use by authority of Parliament in the second year of King Edward VI., according to the Act of Parliament set out in the beginning of this book.

This rubric was not among the alterations in the second Prayer-Book of Edward VI. ordered by the Act, and therefore, apart from sec. 25 of that Act, it had not legal force, although it may be stated that the alterations actually made in the Elizabethan Prayer-Book are not quite accurately mentioned in that Act.

The rubric at the commencement of the Prayer-Book of James I. (1604) repeated the rubric in the Prayer-Book of Elizabeth; but this Prayer-Book was never confirmed by Parliament. The rubric in the present Prayer-Book of 1662 is as follows:—

And here it is to be noted that such ornaments of the church and the ministers thereof, at all times of their ministrations, shall be retained and be in use, as were in this Church of England by the authority of Parliament in the second year of the reign of King Edward the Sixth.

This Prayer-Book has the force of law under the Act of Uniformity 13 & 14 Car. II. c. 14, s. 52. This statute expressly confirms the Act 1 Eliz. c. 2, but contains no section dealing with ornaments.

The construction of the ornaments rubric has been in the present century the subject of considerable litigation, and a further question has also been raised as to whether or not the apparently plain words of the rubric must be taken to be qualified by some order duly taken by competent authority under sec. 25 of 1 Eliz. c. 2. The first question that arises is as to the meaning of the reference to ornaments in the Church by the authority of Parliament in the second year of Edward VI. The general assumption which has been recognised, as will be presently shown, in legal decisions, is that the rubric refers to the first Prayer-Book of Edward VI.

On the other hand, there are certain reasons for considering that the rubric may refer to the ornaments which were in use in the Church prior to the introduction of the first Prayer-Book. The grounds for this view are that the second year of the reign of Edward VI. commenced on January 28, 1548, and ended in January 27, 1549, and the book received the authority of Parliament on January 21, 1549. But under the Act the Prayer-Book in question must be obtained before the Feast of Pentecost

next following (June 9, 1549); but in places where the book had been obtained before that date, it was to be put in use within three weeks after it had been so obtained (2 & 3 Edw. VI. c. 2, s. 8).

It has therefore been argued that the reference in the rubric must apply to a period in the reign of Edward VI. earlier than the first Prayer-Book. If this view is correct, the rubric might be taken to authorise ornaments that were in use in the Middle Ages, excepting such as were connected with relics and shrines, and had been made illegal under the Injunctions of 1547, supposing these to have had the force of law. See article INJUNCTIONS OF EDWARD VI.

It is here impossible to enter into a discussion of the ornaments which on this view would be legal; but the reader is referred to the list given in *The Ornaments of the Rubric*, by J. T. Micklethwaite, p. 21 *ad fin.* See also Lind, *Prov.* p. 251, and Burn, *Eccles. Law*, 9th ed., pp. 375–377.

To consider the legal construction of the rubric. In *Westerton v. Liddell*, 1857, Moore, Special Report, pp. 156, 157, the Judicial Committee of the Privy Council held that the word ornaments in the rubric applies and is confined to those articles the use of which in the services and ministrations of the Church is prescribed by the first Prayer-Book of Edward the Sixth. Their Lordships also considered that the word ornaments is not confined, as in modern usage, to articles of decoration, but used in the larger sense of the word *ornamentum*, “*pro quocumque apparatu seu instrumento*,” and will therefore include all articles used in the performance of Church services and rites, *e.g.* vestments, books, cloths, chalices, and patens. The ornaments specified in the first Prayer-Book are, according to this view, certain vestments differing with the different services: an English Bible, a new Prayer-Book, a poor-man’s box, a chalice, a corporas, a paten, and certain other things. They also considered that there might be articles not expressly mentioned in the rubric, the use of which would not be forbidden by law; but that they must be articles consistent with and ancillary to the service, *e.g.* an organ, a credence-table, cushions, hassocks, pulpit cloths, etc. (p. 187). This construction of the rubric was approved and explained in *Martin v. Mackonochie*, 1868, L. R. 2 P. C. 365, at p. 390.

It may perhaps be questioned whether, even on the view that the rubric comprises only the ornaments authorised by the first Prayer-Book, it is expressly restricted to those mentioned therein. To take one instance, it is unquestionable that the service books in use before the Reformation did not prescribe lights, and it is certainly very probable that the framers of the first Prayer-Book may have intended that the use of ornaments not expressly mentioned should be continued (see *Read v. Bishop of Lincoln*, [1891] Prob. 9; [1892] App. Cas. 644).

A stone altar, it should be added, although mentioned in the first Prayer-Book, is not an ornament within the meaning of the rubric, and cannot therefore be supported by it (*Faulkner v. Litchfield*, 1845, 1 Rob. Eccles. 184; and see also *Westerton v. Liddell*, *supra*).

The question remains to be considered, whether any other order was taken under the Act 1 Eliz. c. 2, s. 25, and whether the ornaments rubric must be construed as modified by such order.

There is no question but that Queen Elizabeth took further and other order by letters under the Great Seal to the Commissioners for Causes Ecclesiastical, 22nd January 1561, whereby she ordered the Table of the Commandments to be set up in the east end of the chancels, not only for edification, but by way of ornament.

A further order was also taken by James I. in 1604, whereby the Prayer-Book was somewhat revised and altered, but which can in no way affect the ornaments rubric.

It has, however, been asserted that the ornaments rubric was modified by the documents known as the Injunctions of Queen Elizabeth, 1559, and the Advertisements of Queen Elizabeth, 1566, and, though this has not been seriously pressed, by Canon 24 of the Canons of 1603, which has certainly recognised the Advertisements. (On this subject, see articles INJUNCTIONS OF QUEEN ELIZABETH; ADVERTISEMENTS OF QUEEN ELIZABETH.)

It is now admitted that the Injunctions were not such a taking of other order; but it was held by the Judicial Committee of the Privy Council, in *Hebbert v. Purchas*, 1871, L. R. 3 P. C. 605, and *Clifton v. Ridsdale*, 1877, 2 P. D. 276, that such order was taken by the Advertisements.

Apart from other objections to this view, it is difficult to reconcile it with the language of contemporaries (*Zurich Letters*, p. 339), or with the report of the House of Lords Committee in 1641. Further, the Advertisements do not follow the precedents of 1561 and 1604, and do not themselves profess to be a taking of other or further order, but are simply for the purpose of enforcing existing order. And it is also very difficult to hold that the authors of the Ornaments Rubric in the Prayer-Book of 1662 could have intended to alter the meaning of words, apparently plain, by a document which is not cited, and which was probably unknown to most clergymen.

(As to the effect of the Advertisements on the vestments authorised under the first Prayer-Book, see article VESTMENTS.)

It may be added that, prior to *Hebbert v. Purchas*, all ecclesiastical lawyers held the Ornaments Rubric, in its natural meaning, to be legally in force.

Crosses and crucifixes are among the ornaments covered by the Ornaments Rubric. See further, COMMUNION, HOLY; RITUAL.

[*Authorities*.—*Strype, Parker, Cardwell, Ecclesiastical Documents*; *Cosins, Works*; *Gibson, Cod.*; *Burn, Eccl. Law*, edited by *Phillimore*; *Stephens, Annotated Book of Common Prayer*; *Stephens, Ecclesiastical Statutes*; *Phillimore, Eccl. Law*, 2nd ed.; *Talbot, Modern Decisions on Ritual*; *M'Coll, Lawlessness, Sacerdotalism, and Ritualism*, 2nd ed.; *Parker, Did Queen Elizabeth take other Order?*]

Orphans.—An orphan is a minor who has lost both of his or her parents. Sometimes the term is applied to such a person who has lost only one of his or her parents (1817, 3 Mer. 48; 1724, Hob. 247). But where a bequest was made to A. B. “until she arrives at the age of twenty-one years, provided she be left an orphan unprovided for, and lives with part of my family,” it was held by Wood, V.C., that though A. B.’s mother was dead, yet as her father was alive, upon whom lay the obligation to provide for her, she was not an “orphan” within the meaning of the bequest (*Guilmette v. Mossop*, 1862, 7 L. T. 190; see also *Russell v. Kellet*, 1855, 3 Sm. & G. 264). The Lord Chancellor is the general guardian of all orphans and minors throughout the realm. In London the Lord Mayor and aldermen have in their Court of Orphans the custody of the orphans of deceased freemen, and also the keeping of their lands and goods.

Ostensible Partner.—See PARTNERSHIP.

Other.—Where there was a gift to second, third, fourth, fifth, and all and every other the son and sons of L., it was held that the first son was not excluded (per Lord Brougham, *Langston v. Langston*, 1834, 8 Bli. N. S. 167). In *Locke v. Dunlop* (1887, 39 Ch. D. 387), it was held that, having regard to the various limitations of the will, the eldest son was excluded from taking under the expression “every other son.”

“All and every other the issue of my body” (see *Allgood v. Blake*, 1872, 41 L. J. Ex. 217).

A power “for the surviving, or continuing, or other trustee or trustees” to appoint new trustees, in the place of a trustee or trustees dying, or desiring to be discharged, or declining to act, held to authorise the appointment by the survivor, who was desirous of being discharged, of four new trustees (*Camoy's v. Best*, 1854, 19 Beav. 414; see also *In re Hagen*, 1877, 46 L. J. Ch. 665).

Otherwise.—*Quere*, whether the words “or otherwise” in rule 6 refer only to cases in which notice has been given under rules 1 or 4 of Order 32 (*Landergan v. Feast*, 1886, 55 L. T. 42; see also *Driffield Linseed Cake Co. v. Waterloo Mills Co.*, 1886, 31 Ch. D. 638).

Where a condition of sale empowered a vendor to vacate the sale if any objection were made “as to the abstract of title, or the evidence thereof, or the conveyance, or as to compensation, or indemnity, or otherwise,” Westbury, L.C., held that the word “otherwise” would comprehend all other subjects as to which there might be an objection or a claim made by the purchaser (*Cordingley v. Cheesebrough*, 1862, 31 L. J. Ch. 621).

An admission “either on the pleadings or otherwise” (Order 32, r. 6, R. S. C.) may be in an affidavit, or even in a letter before action. Jessel, M. R., said that one admission is as good as another (*Hampden v. Wallis*, 1884, 27 Ch. D. 251). As to *ejusdem generis*, see INTERPRETATION, vol. vii. at p. 39.

Ottoman Empire.—See CAPITULATIONS; FOREIGN JURISDICTION; ETC.

Oudh.—See BRITISH INDIA.

Ouster.—“*Ouster*” was the term applied to the injury sustained by a party dispossessed; such dispossession might be with respect to corporeal or incorporeal hereditaments, freeholds, or chattels real. Ouster might be effected in various ways:—

I. As to freeholds: By the wrongful entry of the tenant in one of three events, viz.: (1) On the death of the person seised, and before entry by the devisee or heir (called “abatement”); (2) on the death of the tenant of a particular estate, and before entry by the reversioner or remainderman (called intrusion); (3) by actually turning out the occupier (called disseisin). See ABATEMENT; INTRUSION. Ouster of freeholds might also be effected by “deforcement” and “discontinuance” respectively. Deforcement is “*nomen generalissimum*,” being a much larger and more comprehensive expression than any of the former, and signifying the holding of any lands or tenements to which another person has right; so

that it includes as well an abatement, an intrusion, a disseisin, or a discontinuance, or any species of wrong whatsoever whereby he that hath a right to the freehold is kept out of possession; but, as contradistinguished from the former, it is only such a detainer of the freehold from him that hath the right of property, but never had any possession under that right (*Black. 3 Com. c. 10, apud Hargrave and Buller's Co. Litt. 3316*). Discontinuance was the wrong done to the heir in tail, or the reversioner or remainderman after the estate tail, where a tenant in tail in possession made a feoffment in fee of the land, and the feoffment, operating "by wrong," conveyed what was called an estate by wrong. This tortious operation of a feoffment was abolished by 8 & 9 Vict. c. 106. See for details, FEOFFMENT.

II. As to chattels real, ouster was effected by disseisin. The old remedies for dispossession were either a possessory or a droitural action; the former action determined the right of possession, the other the right of property; and besides this, the dispossessed might re-enter within twenty years. The old actions were superseded by the action for ejectment, and now the remedy is the ordinary action for recovery of land. See RECOVERY OF LAND.

Outfit.—The word "outfit" is sometimes used to denote the necessary stores and provisions put on board the ship for the use of the crew on the voyage; and in this sense outfit is included in a general insurance on a ship (*Hill v. Patten, 1807, 8 East, 375*).

In whaling voyages, however, the word "outfit" has a peculiar sense, and means the fishing stores of the ships so employed, namely, the harpoons, lances, and whale line used for the purpose of catching whales and seals on the voyage, and the casks, cisterns, boilers, etc., for preparing the oil and blubber. It is now established by decision that outfits in this sense are not protected by a general insurance in the common form on the "body, tackle, apparel, etc., of the ship"; and the practice in the United States accordingly is to describe the different interests insured in a fishing voyage as "ship, outfit, and cargo" (1 Phillips, *Ins.* 460, 496, 497).

Outgoings.—The tendency of judicial decisions is to construe the word outgoings as widely as possible in covenants by tenants. Accordingly the tenant who covenanted to pay outgoings has been held liable for drainage expenses; also for paving expenses under the Metropolis Management Acts (*Aldridge v. Ferne, 1886, 17 Q. B. D. 212*). The construction to be put on the word is of importance also in expressions like "free from outgoings" in contracts for sale, gifts, and bequests. In a gift of freeholds and leaseholds, bonds and consols on trust to pay the income, after deducting the ordinary outgoings, to a tenant for life, the tenant for life must bear the cost of drainage work required to be done to one of the leasehold houses by the vestry under the Metropolis Local Management Act, 1855, the deduction including whatever is paid under the lease (*In re Crawley, Acton v. Crawley, 1885, 28 Ch. D. 431*). In conditions of sale a condition that "all outgoings up to the day of possession taken shall be cleared by the vendors," entitles the purchaser to be allowed an apportioned part of the current rent from the last quarter day to the date of the day of possession being taken, such apportioned rent being an outgoing (*Larves v. Gibson, 1866, L. R. 1 Eq. 135*); and where the vendor agrees to discharge all outgoings before completion, a charge in respect of expenses incurred by a

local Act in improving the street in which the purchased houses stand is an "outgoing" which the vendor must discharge, even though the work had been done some time before the houses had become the property of the vendor, and neither he nor the purchaser is aware of the charge at the time of the sale (*Midgley v. Coppock*, 1878, 4 Ex. D. 309). This case has been approved and followed in *Tubbs v. Wynne*, [1897] 1 Q. B. 74. The contract provided that the purchaser should take possession as from 8th May, all outgoing's up to that day being cleared by the vendor; before that date a magistrate made an order to take down dangerous structures on the land, and the order not being complied with, the County Council took them down after 8th May, and demanded and received the expenses of so doing; and it was held that, the liability having been incurred before 8th May, the expenses were "outgoing's" in respect of which the vendor was liable to the purchaser. On the other hand, where by a deed of gift the settlor is tenant for life and covenants to pay all outgoing's during his life, the word does not include expenses of making up portions of the road on which the premises abutted, the work having been done by a local board in the lifetime of the tenant for life on his failure to comply with their notice in a case where the expenses had not been assessed by the board till after his death (*In re Boor, Boor v. Hopkins*, 1889, 40 Ch. D. 572). But this later case is distinguishable on the ground that there was no obligation on the settlor in his lifetime, and there were therefore no outgoing's till after his death; whereas in *Tubbs v. Wynne* there was a direct order made by a magistrate (see *Tubbs v. Wynne, loc. cit.*, p. 79).

In a bequest of all arrears of rent due at the testator's death and all proportions to become due to his estate after his death of rents accruing due at, but payable after, his death, but so that "all outgoing's properly chargeable" against such arrears and proportions and not discharged in the testator's lifetime shall be paid out of such arrears and proportions, the outgoing's chargeable include all such expenses due and remaining unpaid at the testator's death as in the ordinary course of management as carried on by him would at his death come into charge against such arrears and proportions (*In re Duke of Cleveland, Wolmer v. Forrester*, [1894] 1 Ch. 164). The word ought not to be construed in such a case as confined to "rates, taxes, tithes, tithe rent-charge, and other outgoing's (if any) which are recoverable by process of law as against the premises out of which the rents are derived."

Outlawry is an old process of the common law for compelling a person to appear before a Court of justice and meet a charge or claim made against him, and for punishing him for his contempt in not appearing, and for evading writs or warrants issued for his arrest. In the earlier procedure and law books it bulked largely (see *Vin. Abr. tit. "Utlawry"*). The provision of Magna Carta (25 Edw. I. c. 29) forbidding outlawry without due process of law created a large amount of judge-made law, collected in *Viner*, on the extremely complicated formalities necessary to create a valid outlawry and the consequent forfeitures.

In 1344 (18 Edw. III. st. 1, c. 1; 18 Edw. III. st. 2, c. 4) the use of the process of *exigent* was forbidden on indictments of trespass, unless it was against the peace, and prosecutions of conspirators, confederators, and maintainers of false quarrels, and persons who bring routs in the presence of the king's justice in affray of the people to prevent justice being done. And it was in 1350 and by subsequent legislation applied to persons offend-

ing against the Statutes of Provisors (25 Edw. III. st. 4). In 1551 (5 & 6 Edw. VI. c. 11, s. 5) provision was made for outlawing subjects who committed treason while dwelling without the realm. In 1695 (7 & 8 Will. III. c. 3, s. 3) provision was made to adapt the law of outlawry for treason to the new procedure then created for the trial of the offence. From that date up to 1870 the Statute Book is silent as to this process. The Forfeitures Act, 1870 (33 & 34 Vict. c. 23), preserved the forfeitures on outlawry, which go to the Crown; and the Juries Act, 1870 (33 & 34 Vict. c. 77), disqualified a person outlawed in criminal proceedings for acting on a jury or inquest. The statutes above specified represent all that is unrepealed of legislation on the subject.

Outlawry in civil proceedings, both on mesne and final process, existed till 1879 (42 & 43 Vict. c. 59, s. 3), as it still does in Scotland. It had before that date fallen into disuse, and the writ of *capias*, on which it depended, having been abolished for most purposes in 1869, the procedure had become ineffective (3 Chit. *Gen. Pr.* 151, 300).

The Acts of 1344 have been read as permitting outlawry for any indictable misdemeanour, and it could be adjudged for treason, misprision of treason, and felony. It can be awarded in the High Court or before a Court of assize, and, it would seem, any Court of record having criminal jurisdiction. No attempt to outlaw anyone has been made since 1859; but the procedure, which is elaborate, and based on writs of *distringas*, *capias*, *exigent*, and proclamations, has, so far as concerns felony and misdemeanour, been consolidated in rr. 99–121 of the Crown Office Rules, 1886, and the annexed forms. The common law County Court was used for the proclamations, and still survives for this purpose (50 & 51 Vict. c. 55, s. 18). The Lord Chancellor was empowered in 1888 (51 & 52 Vict. c. 3) to extend these rules to outlawry in all other Courts, but has not exercised this power. The Schedule 2 to that Act contains a list of the old Acts superseded as to the High Court, which regulate criminal outlawry in other Courts.

The effect of outlawry in treason or felony was that of a judgment or conviction for the offence, but is now in a sense severer, the forfeitures of lands and goods on outlawry being reserved by 33 & 34 Vict. c. 23, s. 1.

But a person outlawed of treason while abroad can come in within a year and traverse the outlawry and take his trial (5 & 6 Edw. VI. c. 11, s. 5). In felony this apparently cannot be done. Judgment of outlawry in misdemeanour is a conviction for contempt only; but entails forfeiture of chattels. The forfeitures are to the Crown (34 & 35 Vict. c. 26, s. 52), and the Crown alone can pardon the outlaw (27 Hen. VIII. c. 24).

[*Authorities*.—Pollock and Maitland, *Hist. Eng. Law*; Vin. *Abr.* tit. "Utlawry"; 3 Black. *Com.* 283; 4 do. 319; 1 Chit. *Cr. Law*, 347; Short and Mellor, *Crown Practice*, 384.]

Out of, etc.—Where a testator desired that every legatee under his will should contribute £1 per cent. "out of their legacies," Romilly, M. R., said: "I doubt whether the testator intended by the words 'out of' to point out any particular description of legatees who were to contribute; and as he has used the word 'legacies' generally, I think all legacies must contribute" (*Ward v. Grey*, 1859, 26 Beav. 490).

Where there is a devise of an annuity for life to a person, "out of rents and profits," and the rents are insufficient to pay the annuity, the annuitant is not entitled to a continuing charge after his death until the arrears are satisfied (*Wormald v. Muzeen*, 1881, 50 L. J. Ch. 776).

Outstanding Term.—See TERMS.

Outstroke is the right of conveying minerals from an adjoining mine to the surface through a pit or shaft in the demised mine. See **INSTROKE**.

Over.—See *Great Western Ryw. Co. v. Rous*, 1870, 39 L. J. Ch. 553.

Overdrawing Accounts. — See **BANKER AND CUSTOMER**, I. *Relationship*.

Overdue.—See **BILLS OF EXCHANGE**, IV. *Overdue Bill*; **CHEQUE**, I. *Presentment*.

Overriding Trust.—An overriding trust is a trust that takes precedence of such others as have been previously declared. The commonest instances are trusts for renewal of leaseholds overriding the interest of the tenant for life; for cases hereon, see *Hollier v. Burne*, 1873, L. R. 16 Eq. 163; *In re Barber's Settled Estates*, 1881, 18 Ch. D. 624; *In re Lord Ranelagh's Will*, 1884, 26 Ch. D. 590.

The Court will not by decreeing partition put an end to an active overriding trust, *e.g.* where two persons are equitably entitled to realty for life with remainder to their children and issue not yet ascertained, and the trustees of the will had, under an overriding trust, powers of working a quarry on the estate and making roads, etc., and were directed by the testator to work the quarry and divide the profits among the beneficiaries, the Court will not, while the overriding power and trust exist, make an order for partition, or sale under the Partition Acts (*Taylor v. Grange*, 1880, 13 Ch. D. 223; (C. A.) 15 Ch. D. 165).

The duties and power of trustees of renewable leaseholds to renew the same, and the mode of providing money required to pay for the renewal, are now regulated by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 19. And see *In re Baring, Jeune v. Baring*, [1893] 1 Ch. 61; and article **TRUSTS**.

Overseers.—**HISTORICAL INTRODUCTION.**

Churchwardens as Overseers.—The growth of a pauper and vagrant class in the sixteenth century, consequent upon the enclosure of commons, the dissolution of the monasteries, and the confiscation of the property of the religious guilds, necessitated the poor law legislation. Perhaps because there was no other machinery at hand, and perhaps also because of the close connection that existed between religion and charity, the parish was adopted by the State as the unit for administrative purposes, and the churchwardens, who had originally been only ecclesiastical, became civil officers for the poor law and for other purposes.

Originally the poor law administration was assigned to the church-

wardens, and afterwards, to assist them in their duties, the office of overseer was created by statute in 1572 (14 Eliz. c. 5).

In 1601 the Act 43 Eliz. c. 2, which repealed the provisions in the former Act relating to overseers, provided that the churchwardens of every parish, and four, three, or two substantial householders, as should be thought meet, having respect to the proportion and greatness of the old parish and parishes, should be nominated yearly in Easter week, or one month after Easter, under the hands and seals of two or more justices of the peace for the same county, dwelling near the said parish, and be called overseers of the poor for the same parish. By the Overseers Act, 54 Geo. III. c. 91, the appointment is to be made on the 25th of March, or within fourteen days next after (see *post*).

As to rural parishes, the Local Government Act (56 & 57 Vict. c. 73, s. 5, subs. 2) provides that after April 1895 the churchwardens of every rural parish shall cease to be overseers, and that an additional number of overseers may be appointed to replace the churchwardens, and that references in any Act to the churchwardens and overseers shall, as far as respects any rural parish, except so far as those references relate to the affairs of the church, be construed as references to overseers. The Local Government Board, however, advises that in ordinary circumstances the number of overseers shall not be increased. Churchwardens under the Act continue overseers in parishes other than rural parishes; but (s. 36) the Local Government Board may, on the application of the council of any municipal borough, including a county borough, or any other municipal district, make an order conferring on the council of that borough, or some other representative body, the appointment of overseers and assistant-overseers, the revocation of the appointment of assistant-overseers, and any powers, duties, or liabilities of overseers. When an order is made under this section by the Local Government Board, such order generally provides that the churchwardens shall not act as churchwardens *ex officio* (but as to this, see Prideaux' *Churchwarden's Guide*, 16th ed., p. 466).

Where a parish is divided into townships (as to which, see *post*), a chapel warden is not an overseer of the township, nor are the churchwardens of the parish overseers (*R. v. Nantwich*, 1812, 16 East, 228).

Under 29 & 30 Vict. c. 113, s. 2, the same person may be overseer and churchwarden.

PLACES FOR WHICH OVERSEERS MAY BE APPOINTED.

Mode of Election and Qualifications.—The Act 43 Eliz. c. 2, as before stated, made the parish the unit for the appointment of overseers; and, for the purpose of the Act, parochial chapelries which were parishes by repute at the time of the passing of the Act were held to be parishes within the meaning of the statute (*Nichols v. Walker*, 1635, 10 Chas. I. Cro. (3) 394; *R. v. Watson*, 1868, 37 L. J. M. C. 153).

In the case of large parishes, especially in the northern counties, a difficulty was found in working the poor law, and by the Act 13 & 14 Car. II. c. 14, it was provided that two overseers should be appointed for each township and village, instead of being appointed for the parish generally.

Such a division when made was properly effected by an order made by two justices on an application to appoint separate overseers for one or more of the townships or villages within it, and it was necessary to show that the parish at the time of application could not properly relieve its poor, unless such subdivision was effected (*R. v. Inhabitants of Leigh*, 1790, 3 T. R. 746).

By the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101, s. 22), it is made for the future unlawful to appoint separate overseers for any township, village, or any place for which before the passing of the Act separate overseers had not been lawfully appointed; but to this provision there are two exceptions—(1) places formerly extra-parochial; (2) places constituted parishes by statute. (Further, see articles PARISH; TOWNSHIP; VILLAGE.)

Prior to the Local Government Act, 1894, the exclusive right of appointing the overseers was both in boroughs and counties vested in the justices (as to boroughs, see 43 Eliz. c. 2, s. 7; and 12 & 13 Vict. s. 1), who, as a general rule, appointed persons selected by the vestry or taken from a list which the vestry had prepared. The justices, however, had an absolute discretion, and were not bound to appoint the nominee of the vestry (*R. v. Hook*, 1860, 24 J. P. 438; *R. v. Lancashire JJ.*, 1860, 29 L. J. M. C. 244).

In cities and boroughs having a Court of Quarter Sessions, the appointment was made by the borough justices, but in other cities and boroughs the county justices had a concurrent right of appointment with the borough justices; for an extra-parochial place the appointment was made by the justices having jurisdiction over such place, or the greater part thereof.

Under the Local Government Act, 1894, s. 5, the appointment of overseers for every rural parish having a parish council is vested in such council. Under the same Act, when under sec. 1, subsec. b, and sec. 38, an order for granting parishes has been made, the appointment may be made by the parish council of the aggregated parishes.

In rural parishes not having a parish council, the right of appointment is vested in the parish meeting.

In the case of any rural parish, or any urban parish to which the right of appointing overseers has been transferred under this Act, the guardians of the poor law district comprising such parish, if notice of the appointment in the prescribed form is not received by them, shall, within three weeks after 25th April, or after the occurrence of the vacancy, make the appointment, and an overseer so appointed shall supersede an overseer whose appointment has not been notified (s. 50).

Under sec. 33, the Local Government Board may, on the application of the council of a borough, including a county borough or of any other urban district, make an order conferring on such council, or on some other representative body within the district, the appointment of overseers and assistant overseers, and any powers, duties, and liabilities of overseers; and these provisions apply to the councils of urban districts in the administrative county of London. It is open to such bodies adopting these provisions, either to appoint overseers or themselves to perform their duties.

In places where the above provisions of the Local Government Act, 1894, do not apply, overseers are still appointed by the justices as before the Act.

It has been already stated that under the Act (54 Geo. III. c. 91, s. 1) overseers are to be appointed yearly on 25th March, or fourteen days thereafter, but these words are directory and not mandatory, and an appointment made after the date is good, subject, however, in the case of parish councils and parish meetings, to the exception already mentioned (*R. v. Sneyd*, 1841, 5 Jur. 962).

A parish council under the Local Government Act, 1894 (see ss. 3, 7),

appoints overseers at its annual meeting, and this meeting must be held on the 15th April in each year, or within seven days afterwards. When the appointment is made by the parish meeting, it should be made at the annual assembly thereof. In the last two cases, as before stated, notice must be given to the Board of Guardians of the union comprising the parish within three weeks of the 15th April. Otherwise, it is the duty of the guardians to make the appointment.

In cases in which county justices appoint to the office, and no appointment is made, each county justice within the district in which the parish is situate is liable to a penalty of £5 (43 Eliz. c. 2, s. 9; 12 & 13 Vict. c. 8, s. 2), and justices may be compelled to make an appointment by mandamus. When the appointment is made by the justices, it must be made by them under their hands and seals pursuant to 43 Eliz. c. 2 (as to the form of appointment further, see Burn, *Justice of the Peace*, vol. iv. pp. 61–63; Mackenzie, *Overseers' Handbook*, pp. 38–40).

Certain classes of persons are exempt from serving the office: Peers, members of the House of Commons, judges, magistrates, lord-lieutenants, deputy-lieutenants, aldermen of the city of London, practising barristers and solicitors, officers of the Superior Courts of Justice; clerks in holy orders (including Roman Catholic priests); dissenting ministers following any secular employment, but that of schoolmaster; officers in the army and navy, militia officers; members of the Royal College of Physicians, practising members of the Royal College of Surgeons, registered medical practitioners and dentists, practising apothecaries, and certain other civil servants; militiamen, navy volunteers, parish clerks, etc. (for an exact list and the Acts of Parliament, if any, establishing the exceptions, see Mackenzie's *Overseers' Handbook*, pp. 24, 25; Shaw's *Parish Law*, 8th ed., pp. 433, 434).

Further, certain persons are disqualified by statute from holding the office—

(1) Persons convicted of felony, fraud, or perjury (4 & 5 Will. iv. c. 76).

(2) Persons engaged directly or indirectly in any contract for the supply of goods for the workhouse, or for the relief of the poor in such parish (12 & 13 Vict. c. 103, s. 6).

(3) Masters of workhouses and relieving officers, unless permitted by the Local Government Board (13 & 14 Vict. c. 101, s. 6).

(4) Assistant overseers (29 & 30 Vict. c. 113, s. 10).

(5) Persons guilty of corrupt practices at elections (46 & 47 Vict. c. 51, ss. 6, 64; 47 & 48 Vict. c. 70, ss. 2, 3, 36).

(6) Undischarged bankrupts (46 & 47 Vict. c. 52, s. 32, subs. e).

When a person appointed to the office is exempt from serving, the appointment is good until the person appointed appeals to the Court of Quarter Sessions. When, however, he is disqualified under the statutes above mentioned, it is bad *in toto*, except for certain purposes therein mentioned.

The persons to be appointed to the office under the Act 43 Eliz. c. 2, as before stated, must be substantial householders; but the Act makes no distinction of sex, and a woman, properly qualified, is capable of being appointed an overseer (*R. v. Stubbs*, 1788, 2 T. R. 395, 1 R. R. 503).

Further, the term "substantial" is a relative term, and where there are no other persons competent to serve, labourers, who are householders, may be appointed (*R. v. Stubbs*, *supra*).

To qualify a householder for the office, a personal residence is not in all cases necessary, and under certain circumstances a partner in a firm which

uses a dwelling-house for business purposes, but resides elsewhere, is liable to serve (*R. v. Payndor*, 1823, 1 Barn. & Cress. 178).

[In this case, however, it was in evidence that the defendant had enjoyed a privilege peculiar to resident householders.]

Under 5 Geo. III. c. 12, s. 6, a person may be appointed to the office who shall be assessed to the relief of the poor of a parish, and is a householder resident within two miles from the church or chapel of such parish, or, where there is no church or chapel, is resident within one mile from the boundary of the parish; but no person shall be appointed to or compellable to serve the office who is not a resident householder within the parish.

The appointment of persons resident for only a part of the year has been discouraged by the Courts, but is permissible in case of necessity, of which necessity the authority appointing must be the judge (*R. v. Moor*, 1690, 1 Bott, 2; *R. v. Stubbs*, *supra*).

Not more than four overseers may be appointed, except where a parish is subdivided into townships, or where, under the Local Government Act, 1894, s. 5 (2), a parish council or parish meeting has a right to appoint overseers in place of churchwardens under the Local Government Act, 1894, s. 5 (2). The appointment of one person as overseer was formerly bad (*R. v. Cousins*, 1864, 33 L. J. N. S. M. C.).

Under 29 & 30 Vict. c. 103, s. 11, however, one overseer may be appointed when it is not convenient to appoint more; and in extra-parochial places one overseer may be appointed.

When an overseer has been appointed, a copy of the instrument under which he is appointed should be served upon him, as until he receives notice of his appointment he is not liable for neglect of duty. When the appointment is made it is open to the overseer himself or the parishioners to appeal to the next Court of Quarter Sessions against it (43 Eliz. c. 2, s. 5) (*R. v. Forrest*, 1789, 3 T. R. 38; 1 R. R. 628; *R. v. Inhabitants of Great Marlow*, 1802, 2 East, 244; 6 R. R. 420; *Gillott v. Parish Council of Bodicott*, 1896, 60 J. P. 442). An overseer who refuses to take up the office is guilty of a misdemeanour at common law, for which he may be indicted (*R. v. Jones*, 1731, 2 Stra. 1145). It would probably, however, be a good defence to such an indictment if the person appointed had put himself in such a position that if he had actually been overseer a casual vacancy of the office would have occurred. Such a casual vacancy arises if an overseer removes from the locality, dies, or becomes insolvent. The casual vacancy will, in such case, be filled up by the body which ordinarily makes the appointment (17 Geo. II. c. 38, s. 3). The custody of the instrument under which their appointment is made pertains to the overseers (*R. v. Stoke Golding*, 1817, 1 Barn. & Ald. 173, 18 R. R. 452).

DUTIES AND POWERS OF OVERSEERS.

Acts which the overseers as a body are competent to perform, may be validly done by a majority of them (*Doe v. Clark*, 14 East, 488; *R. v. Warwickshire JJ.*, 1837, 6 Ad. & E. 870); and for some purposes, *e.g.* for signing a poor rate, such majority may be obtained by an assistant overseer joining to sign (*Baker v. Locke*, 1864, 34 L. J. C. P. 49).

On new overseers coming into office, which generally happens on their appointment, it is the duty of their predecessors, prior to the half-year's audit of the accounts of the parish, to pay over to them any balance of moneys remaining in their hands, and after the audit to hand over to them all books, deeds, papers, goods or chattels belonging to the parish (see further, 7 & 8 Vict. c. 101, ss. 33 and 34). It is the duty of the new

overseers to see that the accounts agree with the accounts as passed at the audit. If any rates are in arrear from the preceding year, the new overseers have the right to collect them, and should do so without delay (43 Eliz. c. 2, s. 4; 17 Geo. II. c. 38, s. 11; *Overseers of East Dean v. Everett*, 1861, 30 L. J. M. C. 117). If a new rate is required, they should proceed to make it at once (see article POOR LAW).

Under certain statutes the overseers with the churchwardens were, and in some cases remain (see *ante*), a body corporate, with power to hold land for workhouses acquired under the Act 59 Geo. III. c. 2 (see s. 17), and also goods, furniture, etc., belonging to the parish (33 Geo. III. c. 137). They could also hold vestry rooms, parochial offices, etc., and are often trustees for the purposes of parochial charities. In rural parishes, under the Local Government Act, 1894, s. 5, subs. 2 (*e*), the legal interest in all property vested in the overseers or in the churchwardens and overseers, other than property connected with the affairs of the church, or held for an ecclesiastical charity, shall, if there is a parish council, vest in that council, subject to all trusts and liabilities affecting the same, and all persons concerned shall make or concur in making such transfers, if any, as are requisite for giving effect to this enactment. Under sec. 19, subsec. 7, the legal interest in all property, which under the Act would, if there were a parish council, be vested in the parish council, shall in like manner as above vest in the chairman and overseers of the parish, who under subsec. 6 are, in rural parishes not having a parish council, constituted a body corporate by the name of the chairman and overseers of the parish, with power to hold land for the purposes of the parish without licence in mortmain. Under secs. 14 (subs. 2) and 19 (subs. 5) overseer trustees of charities in rural parishes will be replaced by trustees nominated by the same number of trustees nominated by the parish council or parish meeting, and when the charity is not ecclesiastical this enactment will apply as if the churchwardens were specified therein as well as the overseers (on this point further, see *In re Ross' Charity*, [1897] 2 Ch. 397; *In re Perry Almshouses*, [1898] 1 Ch. 391).

The right of preparing a poor rate in any parish (except it be otherwise provided by a local Act) is vested in the overseers and churchwardens (but as to these latter see *ante*), or in the greater part of them; or where under 14 Car. II. c. 12, s. 21, overseers are separately appointed for different townships, in the overseers of such township or in the majority of them, and they may be compelled to do so by a mandamus (*R. v. Edwards*, 7 Geo. III. 1 Black W. 637; *R. v. Edlaston*, 1837, 6 L. J. M. C. 20).

When the rate has been made, it must be "allowed" or consented to by two justices of the peace (43 Eliz. c. 2, ss. 1, 8; 12 & 13 Vict. c. 13, s. 1); but this "allowance" is only a ministerial act, the justices having no discretion to refuse it, although they may think it unjust. The rate must be made in the form prescribed by the Act 6 & 7 Will. IV. c. 96, s. 1, and must be based upon the net annual value of the hereditaments rated thereunto. When a rate has been allowed by the justices, a notice of publication must be affixed by the overseers or some of them prior to divine service (morning or evening) on or near to the doors of all churches or chapels within the parish or place when there is church or chapel (see 45 & 46 Vict. c. 20, s. 4). (The general question of assessment of poor rates, rateable property, appeals against poor rate, payment of rates by instalments, etc., is discussed in the articles POOR LAW; RATING).

The overseers are personally responsible to the guardians for the punctual collection of the poor rate, and if the duty of collection is not assigned to an assistant overseer, they must collect it themselves. The

duty of a person assessed to the rate is, as soon as the same has been made and published, to pay it (*Davis v. Burrel*, 1861, 10 C. B. 826).

If the person assessed refuses to pay, a demand note should be addressed to him, and the amount due may, upon a summons taken out by the overseers, be recovered under a warrant of distress by two justices upon his goods, and if the justices think fit, payment of the expenses incidental to the warrant and distress may be also so enforced (12 & 13 Vict. c. 14, s. 1). If sufficient distress cannot be found, the defaulter may be imprisoned by two justices for any period not exceeding three months, or until the sum or sums which shall be owing be sooner paid (12 & 13 Vict. c. 14, s. 2).

Fines and penalties payable in aid of the poor rate are received by the overseers, and must be accounted for by them.

It is the duty of the overseers to pay to such person as the order of the Local Government Board shall direct to receive the same, all sums which by order of the guardians are directed to be provided out of the poor rates of the parish, and to produce the receipt for the same at the half-yearly audit. In case of wilful disobedience to this order, an overseer is liable for the first and second offence to pecuniary penalties, and the third offence will be a misdemeanour (4 & 5 Will. IV. c. 76, s. 98; and see also 7 & 8 Vict. c. 101, s. 63).

Under the Highway Act, 1864, it is the duty of the overseers receiving a precept from the Highway Board or district council to pay the sum therein specified out of the poor rate to the treasurer of such board or council. Overseers have the same powers with regard to making and levying such rate as in respect of ordinary poor rate. (See further article HIGHWAYS.)

As to the duties of overseers with regard to other rates, see article RATING. See also articles COUNTY RATE; BOROUGH RATE; LIGHTING AND WATCHING.

As to the duties of overseers in respect to the preparation of the list of voters, see article REGISTRATION OF VOTERS.

As to the duties of overseers with regard to parish councils and parish meetings, *vide sub-titulis*; and see article PARISH; with regard to the vestry, see article VESTRY, and see also article METROPOLITAN VESTRIES.

It is the duty of the overseers, on receiving a precept from the clerk of the County Council, to make out in the form accompanying the precept a list of all men in the parish qualified to serve upon a jury (see 6 Geo. IV. c. 50; 33 & 34 Vict. c. 77; 51 & 52 Vict. c. 41, s. 89). (As to this subject further, and as to the qualifications, see article JURY.)

The overseers are directed by the Local Government Board (see general order of the Poor Law Board, 14th January 1867); as to the authority of the Local Government Board to make such orders, see article LOCAL GOVERNMENT BOARD), except so far as such books are kept under their direction by any collector, to keep—(1) a rate book; (2) a book of receipts and payments; (3) a balance-sheet of receipts and payments for every half-year; (4) in cases where there are more than thirty ratepayers, and there is no collector, a rate receipt cheque-book, a general receipt cheque-book; and must, when required by the auditor for the time being, or by the Local Government Board, make out a terrier of the lands and tenements, and an inventory of stocks, moneys, goods, and effects belonging to such parish, or given or applicable in aid of the poor rates thereof. The rate and receipt and payment book must be balanced to the 25th of March and the 29th of September in each year, and as soon as may be after such dates the accounts shall be audited. As soon as the notice of

the day fixed for the auditing of the accounts is received from the auditor, the overseers must affix a notice thereof upon places where the parochial notices are usually affixed, and seven clear days before the time appointed for the audit deposit the accounts at the place appointed, and permit any person having an interest to inspect or copy the same. The same provisions apply to an extraordinary audit.

It is the duty of the overseers to attend the audit, and to submit their books, vouchers, etc. (As to the penalties of an overseer failing to attend the audit, neglecting to publish notice, etc., see 4 & 5 Will. IV. c. 76, s. 98. As to a churchwarden overseer, see *Holgate v. Brett*, 1888, 52 J. P. 661.)

(As to appeals against the auditor, and as to the audit generally, see article LOCAL GOVERNMENT BOARD.)

All rates now or hereafter made by overseers are subject to audit (39 & 40 Vict. c. 61, s. 37.)

(Note.—Overseers (and churchwardens) apart from the Local Government Act not being a corporation at common law, cannot authorise certain acts which such a body might do (see *Ex parte Annesley*, 1843, 2 Y. & C. C. 350).)

Overseers may be sued in the same way as ordinary individuals, and it may generally be stated that overseers will be held jointly liable on contracts. An exception, however, exists in the case of loans. It is no part of the duties of an overseer to borrow money for the purposes of the parish, and if he does do so, the lender will have an action against him; but not against his co-overseers (*How v. Keech*, 1772, 1 Bott. P. L. Cas. 339; *Massey v. Knowles*, 1821, 3 Stark. 65); and even in actions to secure payment for goods supplied to one overseer, it is a question for the jury whether credit as a matter of fact was given to such overseer in his individual capacity, or to the parish, as in the latter case only will his co-overseers be liable (*Eadon v. Titmarsh*, 1834, 1 Ad. & E. 691).

Overseers are not liable upon the contracts of their predecessors in office (*Sowden v. Emsley*, 1821, 3 Stark. 28), except that under the Act 11 & 12 Vict. c. 91, s. 1, they must discharge debts which their immediate successors have contracted within three months prior to the termination of their period of office.

An overseer, though not criminally liable for the defalcations of a co-overseer, may be liable to make good the loss occasioned by such defalcations, especially if his negligence has in any way contributed thereto (*Sewell v. Nixon*, 1842, 6 J. P. 249; *R. v. Jeffrey*, 1859, 23 J. P. 277).

The relief of the poor which was originally the duty of the overseers is now assigned to the guardians. But overseers under 4 & 5 Will. IV. c. 76, s. 54, may in case of urgent necessity give temporary relief out of the poor rate, but in kind only, and should report their having done so to the relieving officer of the district, or to the Board of Guardians (see further, article POOR LAW). As to the duties of overseers with regard to lunatics, see article ASYLUMS.

Certain other duties are also cast upon overseers under various Acts in reference to Allotments, the Baths and Washhouse Act, Burial Grounds, Churchyards, Disorderly Houses, Gaming Houses, the Elementary Education Acts, Perambulation of the Parish, the provision of Fire Engines, the appointment of Parish Constables (where they are still appointed), Parish Officers, Vaccination, Village Greens. These are summarised in Mackenzie's *Overseers' Handbook*, ch. xvi.

It is the duty of the overseers (and churchwardens where they act as overseers) to cause dead bodies thrown on the coast to be interred in the burial-

ground of the parish (48 Geo. III. c. 75, s. 3, 4, 5 and 6; 49 Vict. c. 20). The expense is defrayed by the county; and an overseer neglecting this duty is liable to a fine. Overseers may not make any profit out of the burial or disposal of any dead body (7 & 8 Vict. c. 101, s. 31).

The Local Government Board (see Letter, 27th January 1894, Mackenzie's *Overseers' Handbook*, p. 160) considers that the rate book must be kept by the overseers in some public place, where it may be freely inspected and copies taken (17 Geo. II. c. 38, s. 1). Overseers may provide out of the poor rate, copies of the statutes relating to the duties of their office, and official publications. Copies of by-laws made by a district council must be sent to the overseers of the parish or place to which they relate, and must be deposited by them with the public documents, and the ratepayers are at liberty to inspect the same (38 & 39 Vict. c. 55, s. 188).

Overseers are not entitled to any salary, except in cases where, there being no householder in the parish fit to serve, an inhabitant of an adjoining parish is appointed, who may receive a salary out of the poor rate (29 & 30 Vict. c. 113 (see *supra*)). Overseers may charge for travelling expenses, and certain expenses of printing or other reasonable expenses of their office, unless appointed at a salary, for loss of time, or for the employment of a servant (6 & 7 Vict. c. 18, s. 57; 7 & 8 Vict. c. 101). An overseer who leaves the parish and so ceases to hold office, must hand over all moneys, books, and papers to one of the remaining overseers.

In case of the death of an overseer, his executors or administrators must, within forty days therefrom, hand over any books, papers, or moneys in his possession to one of the overseers, and moneys due from him in his official capacity must be satisfied before the payment of other debts (17 Geo. II. c. 38).

Overseers failing to deliver over accounts and moneys may be committed to prison (17 Geo. II. c. 38). Proceedings against an overseer in respect of his duties must be instituted within six months of the alleged default (see 56 & 57 Vict. c. 61, s. 1).

ASSISTANT OVERSEER.

The office of assistant overseer was established by the Act 59 Geo. III. c. 12, which authorised the inhabitants of every parish, village, and township, assembled for the purpose in vestry, to elect discreet persons as assistant overseers. Upon election, such persons were to be appointed by two justices under their hands and seals, at such salary as might be fixed by the vestry. Assistant overseers might also, prior to the Local Government Act, be appointed by the guardians, but this is now abolished (see s. 81 (6)). Vestries continue to appoint overseers except in rural parishes, where the right is transferred by the Local Government Act, 1894, to the parish council or parish meeting (see *ante*); or where in urban parishes the right of appointment has been conferred on a representative body (see *ante*). Assistant overseers may also be appointed under the provisions of a local Act.

Under the Act 59 Geo. III. c. 12, an assistant overseer may be required to give security to the vestry; and under the Poor Law Amendment Act, 1844, s. 61, he must give security to the Board of Guardians of the union in which his parish or township is situate.

The Act prescribes that the assistant overseer shall be a discreet person, and an infant is not eligible for the office (*Claridge v. Evelyn*, 1821, 5 Barn. & Ald. 81, 24 R. R. 289). The object of the assistant overseer is to assist the overseers in large parishes in the performance of their duties.

Properly speaking, the duties of an assistant overseer should be specified at the time of his election. If this is not done, he will be deemed to be appointed generally to assist in the duties of an overseer. Generally speaking, he performs his duties in the same manner as an ordinary overseer (see *ante*). He must in all matters obey the orders of the overseer, or of the majority of them (7 & 8 Vict. c. 101, s. 61). The salary of an assistant overseer is paid out of the poor rate. If his salary is increased, he must be reappointed (*Holland v. Lea*, 1854, 23 L. J. 122); but a reappointment is not necessary if the salary is reduced (*Frank v. Edwards*, 1853, 22 L. J. Ex. 42).

An assistant overseer remains in office until he is removed by the body which appointed him. The Local Government Board has also the power to remove an unfit or incompetent overseer (4 & 5 Will. iv. c. 76, s. 48).

An assistant overseer cannot be a guardian (5 & 6 Vict. c. 57, s. 14), an overseer (29 & 30 Vict. c. 113, s. 10), or a parish councillor, nor a member of an urban district council nor town council, which have the right of appointing overseers (56 & 57 Vict. c. 73). If he is convicted of fraud, felony, forgery, or corrupt practices, his office becomes vacant (4 & 5 Will. iv. c. 76; 46 & 47 Vict. c. 55; 47 & 48 Vict. c. 70).

A master of a workhouse, except with the permission of the Local Government Board, is also disqualified (13 & 14 Vict. c. 101). An assistant overseer who suffers loss in point of salary, etc., through the Local Government Act, 1894, is entitled to compensation (*West v. Wilts County Council*, 1893, 10 T. L. R. 19).

Under certain circumstances an assistant overseer is entitled to a superannuation allowance (see Mackenzie, *Overseers' Handbook*, pp. 220–222).

[*Authorities*.—The general duties of an overseer are defined in the *Overseers' Handbook*, 4th ed., by W. Mackenzie, to which the reader is referred, together with the diary, orders, and forms therein contained. See for history, Reeves, *Hist. English Law*; and see also Shaw, *Parish Law*, edited by Dodd; Steer, *Parish Law*; Burn, *Justice of the Peace*; Prideaux, *Churchwarden's Guide*, 16th ed.]

Overt Act.—See TREASON.

Overtaking Ship.—See COLLISIONS AT SEA, vol. iii. at pp. 105, 106.

Own.—In the provision of Order 16, r. 11, of the R. S. C., 1883, to the effect that “no person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his *own* consent in writing thereto,” *own* is an abbreviated mode of expressing what is expressed in sec. 34 of the Common Law Procedure Act, 1852, which provides that the plaintiff must consent “by writing under his or her hand.” Accordingly the consent in writing of the party’s solicitor on his behalf, signed by the solicitor, though written and signed in his presence, is not sufficient to bind him (*Fricker v. Van Grutten*, [1896] 2 Ch. 649). “The word *own* in the rule has been introduced to emphasise the language . . . the object being to prevent mistakes occurring, and so that a plaintiff or next friend should not incur liability for costs without his own written authority” (per Lindley, L.J., *loc. cit.*).

Owner.—The word *owner* is frequently used in statutes and specially in the various Building Acts and Local Management Acts. The word as used in the Metropolitan Building Act has been interpreted in the following among other cases:—*Owner* in sec. 3 of 18 & 19 Vict. c. 122, includes a lessee, whether he have a legal or equitable title only, so long as he has power to let the houses (*Cardwell v. Hanson*, 1872, L. R. 7 Q. B. 55); and as regards the owner's liability for fees to surveyor, owner means the owner for the time being when such fees become due (*Tubb v. Good*, 1870, L. R. 5 Q. B. 443); on the other hand, the incumbent of a church in the metropolis is not the "owner" of the church within the meaning of the part of the Act dealing with dangerous structures (*R. v. Lee*, 1878, 4 Q. B. D. 75).

For interpretations of the word under the Metropolis Management Acts and the Local Government Acts, see the following cases:—*Plumstead Board of Works v. British Land Co.*, 1875, L. R. 10 Q. B. 16, 203; *Pound v. Plumstead Board of Works*, 1872, L. R. 7 Q. B. 183 (both cases on "owners of land"); and cp. *Angell v. Vestry of Paddington*, 1868, L. R. 3 Q. B. 714; *School Board for London v. Vestry of St. Mary, Islington*, 1876, 1 Q. B. D. 65; *Williams v. Wandsworth Board of Works*, 1884, 13 Q. B. D. 211; *Wright v. Ingle*, 1886, 16 Q. B. D. 379, and cases therein cited.

"Owner" in the Nuisances Removal and Sanitary Acts includes any person receiving the rents of the property in respect of which the word is used from the occupier of such property, on his own account or as trustee or agent for any other person. Where a lessee underlets the upper part of a house, the person who receives rent from the lessee and not from the under tenant who occupies the premises on which there is a nuisance, is not the "owner" within the Acts (*Cook v. Montagu*, 1872, L. R. 7 Q. B. 418).

By various sections of the Artisans' and Labourers' Dwellings Acts, 1868, notices are to be served upon the *owner*, and owner for this purpose is defined by the Act as including "all lessees or mortgagees of any premises required to be dealt with under the Act, except persons holding or entitled to the rents and profits for a term of years of which twenty-one years do not remain unexpired. A tenant of a new lease for twenty-one years, although he has in law but an *interesse termini*, has nevertheless such an interest as to make him the *owner* within the provision of the Act (*R. v. Vestry of St. Marylebone*, 1887, 20 Q. B. D. 415).

A vestry acquiring an open space in a square whereof the roads are streets within the Metropolis Management Acts, is the "owner" of the open space, and liable to pay a proportion of flagging the footway of the roads (*St. Mary, Islington v. Cobbett*, [1895] 1 Q. B. 369). And this holds good although the vestry acquire the space on the express condition that it shall be used as a public garden, and if not so used shall be reassigned to the original grantor. And a cemetery company, abutting on whose consecrated land a new street is made, are owners within the provisions of the Act, and liable to contribute to expenses of paving (*Vestry of St. Giles v. London Cemetery Co.*, [1894] 1 Q. B. 699).

As to who are owners within the Public Health Act, 1875, see *Bowditch v. Wakefield Local Board*, 1871, L. R. 6 Q. B. 567; and *Hornsey District Council v. Smith*, [1897] 1 Ch. 843, and cases there cited. And as to the use of the words in the London Building Act, 1894, "adjoining owner," see *List v. Tharp*, [1897] 1 Ch. 260. An injunction will be granted to restrain a building owner from proceeding with his works without the statutory notice to a person who has entered upon land and erected buildings under an agreement for a lease, though no lease has been executed, such intending lessee being an adjoining owner for the purposes of the Act.

Oxgang.—In Old English law, so much land as an ox could till, according to some, fifteen acres (*Co. Litt.* 69 *a*). According to Balfour, the Scotch oxengang or oxgate contained twelve acres; but this does not correspond with ancient charters.

Oyer and Terminer.—In addition to the general commission of oyer and terminer always sent to the justices of assize (see *CIRCUITS AND ASSIZES*), a special commission might be, and often was, issued by the king to certain individuals named in it, directing them to inquire, on the oath of honest and lawful men in the county, into the truth of some special trespass or other wrong of which complaint had been made to the Government, and of the names of the malefactors. Frequent instances will be found, *e.g.* in the Calendar of Patent Rolls, temp. Edw. I. (London, 1898). It was provided by the Statute of Westminster the 2nd, 13 Edw. I. c. 29 (1285), that commissions of oyer and terminer should be issued only to justices of either bench, or justices in eyre, unless it were for an heinous trespass, where it was necessary to provide speedy remedy, and the king thought fit of his special grace to grant it. And Statute 2 Edw. III. c. 2 (1328), enacted that they should not be granted but before justices of one bench or the other, or justices errant, and that for great hurt or horrible trespass, and of the king's special grace (see Hawkins, *Pleas of the Crown*).

Oysters.—Oysters are the subject of property when laid or growing in a private fishery, even on the foreshore, if it be within territorial waters; and appropriation of them in such a case is punishable as a misdemeanour, under sec. 26 of the Larceny Act, 1861, where the bed, laying, or fishery is sufficiently marked out and known as private (and see 31 & 32 Vict. c. 45, ss. 51, 52, 55). Oyster fisheries of this kind may be acquired by prescription or proof of an immemorial user, and do not fall within the rule against the legality of claims of a *profit à prendre in alieno solo* (*Goodman v. Saltash (Mayor)*, 1881, 9 App. Cas. 633; and see *Mills v. Colchester (Mayor)*, 1868, L. R. 3 C. P. 575; *In re Free Fishers of Faversham*, 1887, 36 Ch. D. 328). See *FISHERIES*. They may also be acquired by direct grant from the Crown, or by lease from the Commissioners of Woods and Forests. Under the Sea Fisheries Act, 1868, orders creating such fisheries for a period not exceeding sixty years, and vesting them in particular promoters, may be granted by a Secretary of State after a proper local inquiry (31 & 32 Vict. c. 45, ss. 29–50; 50 & 51 Vict. c. 52, s. 2 (3)). The order may be for a several fishery, or merely a right to regulate the mode of working a general fishery for oysters. Where the fishery is several, the order vests in the promoters all oysters within its limit (31 & 32 Vict. c. 45, ss. 51, 52).

The order may not abridge or take away any right of several fishery, or any right over the seashore, enjoyed under a local or special Act, or by royal charter, letters-patent, prescription, or immemorial usage, unless the possessor consents (31 & 32 Vict. c. 45, s. 48).

The statute supersedes an Act of 1866 (29 & 30 Vict. c. 85) as to oyster and mussel fisheries, but keeps alive orders made under that Act. The orders made are collected, up to 1893, in the Appendix to the Index to Statutory Rules and Orders, and since then in tables at the end of the annual volumes of Statutory Rules and Orders. Secs. 51, 55 of the Act make provision for punishing persons who injure the fisheries or steal the oysters,

The order must be confirmed by Parliament, unless it is limited to a grant of right of fishery for not over twenty-one years and over not more than five acres, or amends a previous order without extending the area of the fishery, and is not objected to. In such a case it can be confirmed by Order in Council (40 & 41 Vict. c. 42, s. 7).

The Board of Trade is given a general power to supervise the fisheries created by its grants, and also fishery companies created since 1863 by local Acts, and subjected to inspectors of fisheries which are put in the position of promoters under the Act of 1868.

The grants may, after local inquiry, be determined by certificate of the Board of Trade, as to the whole or any part of the fishery, if the grantees do not properly cultivate oysters, nor observe and enforce the regulations of the grant (31 & 32 Vict. c. 45, s. 45; 32 & 33 Vict. c. 31, s. 2; 38 & 39 Vict. c. 15, s. 2).

The Board of Trade reports annually to Parliament as to the proceedings under the Acts.

In 1877 a close time for oysters was created under 40 & 41 Vict. c. 42, s. 4, viz. from 15th June to 4th August for deep-sea oysters, and from 14th May to 4th August for other oysters. It does not apply to foreign oysters, even if stored in English waters till wanted for sale (*Robertson v. Johnson*, [1893] 1 Q. B. 129).

The same Act empowered the Board of Trade to make, after public inquiry, orders restricting dredging (in fisheries not several nor created by grants or orders under the Act of 1868), on the application of representatives of the local fishermen, the county council, or an urban or rural district council, or a port or harbour authority (40 & 41 Vict. c. 42, s. 6).

It was intended that oyster fisheries in beds in the sea between England and France outside the exclusive natural fishery limits should be regulated under the Convention of 1867 and Part II. of the Act of 1868, but the Convention has not come into force (see St. R. & O. revised, vol. iii. p. 238).

As to native oysters, see *Whitstable Free Fishers v. Elliott*, W. N. 1888, p. 27.

P.A.—Particular Average.—See AVERAGE.

Pacific Ocean.—See FOREIGN JURISDICTION, vol. v. at p. 432.

Packed Parcels—The name for a consignment of goods, consisting of one large parcel made up of several small ones (each bearing a different address) collected from different persons by the immediate consignor (a carrier), who unites them into one for his own profit at the expense of the railway by which they are sent, because the railway company would have been paid more for the carriage of the parcels singly than together. It has frequently been determined to be illegal for a railway company to charge a higher rate for "packed" than other parcels (see *G. W. Rwy. Co. v. Sutton*, 1870, L. R. 4 H. L. 226, and the cases cited therein).

Paid-up Shares.—See COMPANY,

Pains and Penalties.—See BILL OF PAINS AND PENALTIES.

Paintings.—See COPYRIGHT.

Pairing, Pairing off, is a practice in Parliament, which is said to have had its origin in the time of Cromwell, by which a member whose opinions would lead him to vote on one side of a question, agrees with a member on the opposite side that they both shall be absent for a specified time, so that a vote is neutralised on each side.

Pais.—See ACT IN PAIS; ESTOPPEL.

Palace Court.—This Court was first constituted by letters patent in 1612 (12 Jas. I.), and continued under this patent until 1631 (6 Chas. I.), when a new patent was granted. Its legality was questioned in *Fish v. Wagstaff*, 1634, Cro. (3) 318. On the Restoration, doubts were again raised as to the validity of this patent (*Inman v. Batton*, 1664, 1 Sid. p. 180); and to remove them, “fresh Letters Patent were granted in 1665 (16 Chas. II.), which constituted the Court as the Court of the Lord the King of the Palace of the King at Westminster.” It was given jurisdiction over all personal actions to whatever amount arising between any parties within twelve miles of Whitehall, except in the jurisdiction of the Court of the Marshalsea, or the City of London, or in Westminster Hall.

The charter provided for the judges, officers, jurors, and sittings. The Court sat weekly, first in Southwark, then at the Newington Sessions House, and finally in Great Scotland Yard, Whitehall. The Court differed from the Marshalsea Court, which existed by prescription, in that its suitors need not be of the household, and that it had no jurisdiction over the household. Its process appears to have been executed by persons known as bearers of the rod of the verge (*R. v. Stobbs*, 1790, 3 T. R. 735).

The judges of the Court were the Lord Steward, the Marshal of the Household, and the Steward of the Court or his lawful deputy, who must be a practising lawyer. The procedure was regulated by rules of practice made in 1675, and served the metropolis as a Court corresponding to the Mayor’s Court in the city. But owing to numerous abuses, especially with reference to arrest, or mesne process, and perjury by persons known as “men of straw,” it became a public scandal, and was abolished in 1849 (12 & 13 Vict. c. 104, ss. 13–17), and its place taken by the County Courts then recently established.

The history and practice of the Court up to 1827 are to be found in Buckley on *Marshalsea and Palace Courts*, written by a prothonotary of the Court.

Palagium—A duty to lords of manors for exporting and importing vessels of wine at any of their ports.

Palatine.—See DURHAM; LANCASTER.

Palmer Act.—Palmer Act (19 & 20 Vict. c. 16), so called after the poisoner, William Palmer of Rugeley, in whose interest it was introduced into Parliament by Lord Campbell, enables an indictment against a person accused of a crime committed out of the jurisdiction of the CENTRAL CRIMINAL COURT to be removed by CERTIORARI to that Court, in order to give him a trial free from local prejudice. It is not a sufficient ground for such removal that the prisoner belongs to an unpopular class (*Ex parte Williams*, 1884, 1 T. L. R. 15). No appeal lies to the Court of Appeal from the refusal of the Queen's Bench Division to grant a *certiorari* to remove an indictment to the Central Criminal Court under this statute (see *R. v. Rudge*, 1886, 16 Q. B. D. 459).

Palmer's, Hinde, Act.—See HINDE PALMER'S ACT.

Palmistry.—The practice of palmistry (or the telling of a person's fortune by investigation of the lines of his or her hand) was introduced into England by the gypsies. This appears from a statute of 1531, called an Acte concerning Egypsyans (22 Hen. VIII. c. 10), which recites that "afore thes tyme dyverse and many outlandysshe People, callynge them selves Egyptians, usyng no crafte nor faicte of marchandyse, have comen into thes Realme and gone from Shire to Shire and Place to Place in greate Company, and used greate subtyll and crafty meanes to deceyve the people, beryng them in hande that they by palmestry could tell menne and women's fortunes, and so many tymes, by crafte and subtyltie, have deceyved the people of theyr money." Palmistry was not then made an offence, but all gypsies were ordered to depart the realm. The Act was reinforced against these people by 1 & 2 Phil. & Mary, c. 4, and 5 Eliz. c. 20.

The severe penalties of these Acts were virtually repealed by the Vagrant Act of 1743 (17 Geo. II. c. 5, s. 2), which punished as rogues and vagabonds "all persons pretending to be gypsies, or wandering in the habit or form of Egyptians, or pretending to have skill in physiognomy, palmistry, or like crafty device, or pretending to tell fortunes, or using any subtil craft to deceive and impose on any of His Majesty's subjects."

This was, in 1824, superseded by the Vagrancy Act, 1824 (5 Geo. IV. c. 83, s. 2), which punishes as a rogue and vagabond "every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive or impose on any of His Majesty's subjects." The offender may be arrested without warrant by a constable or any person, and may be sentenced to imprisonment with hard labour for not over three months, subject to appeal to Quarter Sessions (5 Geo. IV. c. 83, ss. 2, 6, 14).

Recently palmistry has been a fashionable amusement, and the subject of many treatises purporting to prove it to be a real science; but, having regard to the wording of the Act of 1824, and the decision in *Penny v. Hanson* (1887, 18 Q. B. D. 478), the practice, whether scientific or not, and whether practised for gain or not, seems to be illegal in England (see 29 L. J. News, 461).

Pamphlet.—See COPYRIGHT; PRINTERS.

Pannage.—(1) Pannage, or pawning, is the food of swine in woods, *i.e.* beech mast, acorns, etc., and hence the liberty for a man's swine so to feed in a certain forest. By Statute Westminster the 2nd (13 Edw. I. stat. 1, ch. 25, 1285), an assize of novel disseisin was granted for it. The name was also given to the money taken by the agisters for the hogs permitted to feed in the royal forests (see **FOREST**, **FOREST LAW**). A right of pannage is simply a right vested by express or implied grant in an owner of pigs, or one of land who keeps pigs, to go into the woods of the grantor, and allow the pigs to eat the acorns and mast which have fallen; it does not preclude the owner of the wood from lopping or cutting down trees (*Chilton v. Corporation of London*, 1878, 7 Ch. D. 562).

(2) A corrupted form of *pavagium*, a toll for the paving of a city or causeway or a way (see *John Webb's case*, 1609, 8 Rep. 45 *b*, at p. 47 *a*).

Pannier-man, or Panier—A word in familiar use amongst the Knights Templars, and from them handed down to their successors, the lawyers of the Inns of Court, signifying an attendant or domestic who waits at table and gives bread (*panis*), wine, and other necessities to those who are dining (see *Calend. Inn. Temp. Rec.* vol. i.).

Pantomime is included in the definition of stage play in the Theatres Act, 1843 (6 & 7 Vict. c. 86, s. 23). See **THEATRES**.

Papal Bull.—A circular leaden seal, engraved on one side with images of Saints Peter and Paul, and upon the other with the name of the pope issuing it, and the date of his accession to the pontificate. It is used to seal official documents emanating from the holy See, and from this fact the documents themselves have acquired the title of bulls.

In the year 1571 an Act was passed (13 Eliz. c. 2) "against the bringing in, and putting in execution, bulls, writings, or instruments, and other superstitious things from the See of Rome." This Act was repealed in part by 9 & 10 Vict. (1846) c. 59, in so far as it imposes the penalties therein mentioned; but it is at the same time expressly declared that it shall not be lawful for any person or persons to import, bring in, or put in execution within this realm any such bulls, writings, or instruments, and that in all respects, save as to the said penalties or punishments, the law shall continue the same as if this enactment had not been made.

Sec. 4 of this Act made offences under it punishable under the Statute of Præmunire (16 Rich. II. c. 5). Three statutes passed in the reign of Henry VIII. (25 Hen. VIII. c. 20 and 21; 28 Hen. VIII. c. 16) prescribed the same punishment for the purchase or use of, or acting under, "processes, sentences of excommunication, bulls, dispensations, licences, etc." These prohibitions were repeated by 1 Eliz. c. 1 (1558), and by the above-mentioned statute of 1846 (see **PÖPE**).

Paper Blockade.—See **BLOCKADE**.

Paper-credit is credit given on the security of any written obligation purporting to represent money.

Paper Office.—Jacob's *Law Dictionary*, 1744, has the following entry:—

Paper office is an ancient office within the palace of Whitehall, wherein all the publick papers, writings, matters of State and Council, letters, intelligencies, negotiations of the king's ministers abroad, and generally all the papers and despatches that pass through the offices of the two principal Secretaries of State, are lodged and transmitted, and there remain deposited by way of library.

In early times there appears to have been no very regular system of preserving State papers. They are found on the Close, Patent, Treaty, and Foreign Rolls, and also among the Records formerly preserved at the Tower of London, and in the Chapter House, Westminster.

Many State papers were enrolled in Chancery up to the twenty-second year of James I., when the Prothonotary of Chancery ceased to so enrol them.

After the establishment of the office of the Principal Secretary (which cannot have been later than the reign of Henry III.), and more especially after the great development of the importance and authority of that officer, the mass of papers with which he had to deal must have accumulated rapidly.

At first no provision was made for their deposit, each Principal Secretary had them in his own custody, and at his death or disgrace they were essentially liable to be destroyed or dispersed.

Up to 1540 no register was kept, even of such supremely important transactions as the Acts of the Privy Council.

In 1578, Queen Elizabeth established under the Great Seal "the office of Her Majesty's Papers and Records for Business of State and Council," and appointed Dr. Thomas Wilson (who was the Master of Requests, and afterwards became one of the Secretaries of State) keeper and registrar of those papers, at a fee of £40 a year.

Before the establishment of this office many papers of great importance were lost, and came into the hands of private persons. Of these, two great collections were made by Sir Robert Cotton in the time of James I., and by Sir Joseph Williamson in that of Charles II. The first of these collections is in the Cottonian Library in the British Museum, and the second was presented by the collector to the State Paper Office, as was also another quantity of papers by Sir Leoline Jenkins.

A mass of papers of the time of the secretaryships of Wolsey and Cromwell remain in the custody of the Crown, but were deposited in the Chapter House instead of the State Paper Office, where they properly belonged.

Up to the time of James I. the papers were kept in chests, but that king, by letters patent of the date of March 15, 1609–10, ordered these papers to be reduced into the form of a library, and also assigned certain apartments in his palace of Whitehall for their reception.

The part of the palace finally appropriated to this purpose was the tower over the gateway, which connected the eastern and western parts of the edifice, standing across the street, now known as Whitehall.

The apartments are described by Tucker as consisting of two rooms, three closets, and three turrets.

This tower fortunately escaped the conflagration which destroyed great part of the palace on the 12th January 1619. Sir Thomas Wilson, writing to the king on that day,

exults with joy, in the midst of so mischievous an accident as that this day, on His Majesty's timely providence on removing the papers under his custody into a place of

better security. Since His Majesty's prophetic presage of the blow in the powder treason, there was never such a prevention of so great a mischief as this would have been. Not so much hurt sustained as the worth of a blank paper.

The papers and documents, however, appear to have been thrown into great disorder by being hastily and confusedly cast into blankets, the better to preserve them from the fire.

William Nicolson, bishop of Carlisle, 1702–1718 (he was afterwards Bishop of Derry and subsequently Archbishop of Cashel, and died 1727), in his *English, Scotch, and Irish Historical Libraries* (*English Library*), p. 180, says—

The Paper Office has suffered much by its removal from its first repository near the old Banqueting House; and in the rebellious times by the free access which the grandees of the then usurping powers (Bradshaw, Thurlo, Milton, etc.) had to it.

This is confirmed by a warrant to Thomas Raymond, dated 1st February 1661, which recites: "Divers books, treaties, papers, and records of State have during the late unhappy troubles been delivered out of the office of our papers by Ambrose Randolph, late keeper, to John Thurloe, John Bradshaw, Henry Scobell, and others, and very few of them returned, to the prejudice of our weighty affairs."

In this same year, 1661, we find preserved the form of the oath of the clerk, keeper, and register of His Majesty's papers and records for matters of State, established at His Majesty's palace of Whitehall.

To do his utmost endeavour to keep and preserve them, not willingly to suffer any to be purloined, embezzled, or defaced; carefully and faithfully to keep secret and conceal from the knowledge of others all things therein contained, except from the Lords and others of His Majesty's Privy Council, and such as His Majesty shall be content to have the same communicated unto; to do his best to recover and bring unto his office any papers or records which belong to His Majesty that may have been embezzled or detained; and to do all things else that shall belong to the duty of his office.

The Paper Office was found to be in a great state of neglect in 1705, when it was visited by a committee of the House of Lords appointed to inquire into the method of keeping records and public papers in offices. An address was presented to Queen Anne, recommending the repair and enlargement of the office, and that the papers should be sorted, digested, and bound in volumes. After a reference to Sir Christopher Wren, it was directed by a warrant (14th November 1706) that the upper floor of the Lord Chamberlain's lodging in the cockpit should be fitted up for a convenient paper office. This was accordingly done, the expense being estimated by Sir Christopher Wren at £807, 2s. 6d.; and so an apartment of 80 feet long and 25 feet wide, which was known as the Middle Treasury Gallery, was added to the office.

The Paper Office remained in this state until the old gateway was pulled down about 1750, when the contents were found to have greatly suffered from vermin and wet. The papers contained in the gallery, which was left standing, remained there, but the contents of the rest of the office were removed to an old house in Scotland Yard.

This house was apparently the Transmitter's Office, which was established in Middle Scotland Yard in 1741 for the reception of modern State papers. In 1755 a warrant was granted by Secretary Fox to seize twenty-two bags of ancient writings and records belonging to His Majesty, concealed in the house of the late John Austis, Garter-King-at-Arms. These records were brought from the State Paper Office on the occasion of the fire in

1619 to the Pells Office in the Exchequer. They were delivered to Garte for the purpose of being arranged. They were finally retransferred to the State Paper Office in 1770, in which year also a number of records, consisting of Rolls of Pleas in the King's Palace Courts, Rolls of Exchequer accounts, Privy Seal writs and warrants from Henry III. to Henry VIII., and indentures of war from Edward III. to Henry VIII., were removed to the State Paper Office from the House of Lords.

The records remained in the Middle Treasury Gallery and the house in Scotland Yard, and suffered further damage from wet, till 1819, when it became necessary to pull down the house in Scotland Yard, and the papers preserved there were again removed to another old house in Great George Street, Westminster. In 1830 a plan was approved and a vote passed for erecting a new fireproof building for the reception of the State papers adjoining to St. James's Park at the north end of Duke street, to which building these records were removed in 1833 from their previous repositories.

By an Order in Council of 5th March 1852, and two Treasury minutes of 8th August 1848 and 18th June 1852, the State Paper Office was directed to become a branch of the Public Record Office on the death or retirement of the then keeper of State papers, the Right Hon. Henry Hobhouse, who died 13th April 1854. Accordingly, on 10th August 1854 Sir John Romilly (afterwards Lord Romilly), the Master of the Rolls issued his warrant, empowering Sir Francis Palgrave, the Deputy-Keeper of the Records, to take possession in his name of the building commonly called Her Majesty's State Paper Office, and all the papers and records therein. For the future destination of these records the reader is referred to the article on RECORD OFFICE.

The office of the Clerk of the Papers in the Court of Queen's Bench was also called the Paper Office, or Paper Mill. This office was a temporary depository for documents and records belonging to that Court, where they were filed and preserved for a time before their removal to the Treasury or the Exchequer, the ultimate repository of judicial records.

By the Statute 1 Vict. c. 30, the office of Clerk of the Papers was abolished, and its duties transferred to the Masters of the Queen's Bench while by 42 & 43 Vict. c. 78 (the Judicature Offices Act, 1879), the offices of the Masters of the Queen's Bench, with others, were concentrated in and amalgamated with the Central Office of the Supreme Court of Judicature.

[*Authorities*.—F. S. Thomas, *History of the State Paper Office*, 1849 *Handbook to the Public Records*, 1853; *State Papers published under authority of His Majesty's Commission*, 1830, vol. i. preface; *Thirtieth Report of the Deputy-Keeper of the Records*; Jacob, *Law Dictionary*, 1744; W. Nicolson Bishop of Carlisle, *The English, Scotch, and Irish Historical Library*.]

Papist.—See ROMAN CATHOLIC.

Paracium.—Coparceners are supposed to take as *unus heres*, that is, jointly as if one descendant, and for most purposes their shares are regarded as equal. But the eldest may get more in *quantity* than the younger. So a tenure may subsist between parceners, and be owed by the younger to the eldest, but without homage or service; and such tenure was known by this term (*Domesday*; and see *Co. Litt.* 163 a–180 a).

Parage.—The word “parage,” or “paragium,” meaning equality, is said to be derived from the Latin adjective *par*, made a substantive by the ending *agium* (*Co. Litt.* 175 *b*). Connected with it are “disparage” and “disparagement” (Blount). It denotes an equality of name, blood, or dignity, but more especially of land, in the partition of an inheritance between co-heirs. More strictly, however, it refers to an equality of condition among nobles or persons holding by a noble tenure. Thus, by feudal law, when a fief is divided among brothers, but from some cause the shares are unequal, the younger hold their part of the elder *jure et titulo paragii*, that is, without any homage or service, as is the case among coparceners by *paracium* (*q.v.*). So we are told in *Domesday*: *Duo fratres tenuerint in paragio quisque habuit aulam suam et potuerint ire quo voluerint*.

In ecclesiastical law the term is also used of equality in marriage, that is, as synonymous with the phrase “without disparagement”; and it is also applied to the portion which a woman may obtain upon her marriage.

Paramount.—The highest lord of a fee. The Crown is lord paramount of all the land in the kingdom; all land being held of it either directly or through some intermediate lord. See REAL PROPERTY; TENURES.

Paraphernalia.—See HUSBAND AND WIFE.

Paravail.—A tenant paravail signified the lowest tenant of land, and was so called because he was supposed to make avail or profit of the land for another (*Cowel*. 2 Black. Com. 60).

Parcels.—See LANDLORD AND TENANT, vol. vi. p. 205.

Parcels, Bill of.—See BILL OF PARCELS.

Parceners; Parcenary.—Parcenary was in ancient times often, and is now generally, called *Coparcenary*. An estate in coparcenary arises, according to Littleton (s. 241), either at *common law*, when a person seised of a tenement in fee-simple or fee-tail dies leaving only daughters or other female heirs, and the tenement descends to them jointly; or *by custom*, when a person seised in fee-simple or fee-tail of a tenement of the tenure of gavelkind in Kent, or of any customary tenement to which the custom of gavelkind descent applies, dies leaving several sons, and the tenement descends to all the sons (see s. 265). Heirs in coparcenary are called coparceners; they constitute together but one heir to their ancestor; they resemble joint tenants in that they have the same unities of interest, title, and possession, and (as seems to have been recognised by Pearson, J., in *In re Greenwood's Trusts*, 1884, 27 Ch. D. 359) they may properly be said to be jointly seised. But, unlike joint tenants, they claim by descent only, and not by purchase; the estate of one of them may arise at a different time from that of the others, *e.g.* upon the death of a coparcener leaving issue, so that there is no necessary unity of time between them; and though they

have unity of interest, they have not the entirety, for as between themselves they have several freeholds descendible to their respective heirs. One coparcener may release to the other, and such a release will operate by way of *mitter l'estate* (*Cruik. Dig.* by White, 4th ed., vol. iv. p. 78), without words of limitation (*ibid.*, p. 278). This results from the joint title of coparceners but apparently, as a result of their several ownership, one may enfeoff the other (*Cruik. Dig.* vol. iv. p. 50). So also they may grant leases either jointly or severally (*ibid.*, p. 68). Formerly the possession of one coparcener was the possession of the other; but the law in this respect has been altered by the Real Property Limitation Act, 1833 (3 & 4 Will. iv. c. 27, s. 12), and a title under that statute may be gained as between coparceners by possession or receipt of the rents and profits of the entirety, or of more than the proper share (see *Burroughs v. M'Creight*, 1844, 1 Jo. & Lat. 290; *Murphy v. Murphy*, 1864, 15 Ir. C. L. R. 205; *Sanders v. Sanders*, 1881, 19 Ch. D. 373; *In re Hobbs*, 1887, 36 Ch. D. 553). To an estate in coparcenary, curtesy and dower are of course incident, there being no survivorship between coparceners, and each share descending to the heir; but dower can only be assigned in common (*Cruik. Dig.* vol. ii. p. 394; see also *Reynard v. Spence*, 1841, 4 Beav. 103). Ordinarily coparceners can enjoy the tenement which has descended to them by joint occupation or joint receipt of the rents and profits. But there are various inheritances which cannot be so enjoyed. Many of these are mentioned by Lord Coke (*Co. Litt.* 164 b, 165); and those so mentioned include a villeine, estovers, homage and fealty, piscaries incertaine, and common sauns nombre. Most, as he explains, may be enjoyed by the coparceners alternately; and this is the case with advowsons, to which the coparceners should present alternately, according to seniority; usurpation, whether by one of the coparceners or by a stranger, not affecting the order of the turns (*Cruik. Dig.* vol. iii. pp. 17, 18). On the other hand, an inheritance of honour and dignity capable of descending to heirs female, such as a barony in fee, cannot be enjoyed by coparceners, but remains in abeyance until that be terminated, either naturally or by the king, who has the right of conferring the dignity upon which of the coparceners he pleases (*Co. Litt.* 165 a). An office of honour which has descended to coparceners is capable of being jointly exercised by them by deputy (*Co. Litt.* 165 a, note 8; and *Cruik. Dig.* vol. iii. pp. 106, 107), or by one of the coparceners (if of the male sex and sufficient dignity) with the consent of the others, as appears to be the case at present with respect to the office of Lord Great Chamberlain, held of the king by grand serjeanty in gross, of which the Earl of Ancaster, the Earl of Carrington, and the Marquis of Cholmondeley are jointly seised in unequal shares, and which is executed by the first-named peer in accordance (as is understood) with a family arrangement for its execution by the respective heads of the several families alternately during successive reigns. The dignity of the Crown of England is (as Lord Coke observes) without all question descendible to the eldest daughter and her posterity; and this is an exception to the general rule of descent. An estate in coparcenary is destroyed by descent of the entirety to one of the coparceners, or by the alienation by one coparcener of his share to a stranger, which disunites the title to the alienated share, or by partition, which disunites the possession. Littleton enumerates (ss. 243 *et seq.*) four modes of voluntary partition, all of which (as well as some others mentioned by Lord Coke) are now practically obsolete, the Real Property Act, 1845 (8 & 9 Vict. c. 106, s. 3), having rendered a deed necessary in all cases of voluntary partition of tenements not being copyhold, though, of course, an agreement in writing within the Statute of Frauds (29 Car. II. c. 3) to make partition will be

effectual in equity. It is a mistake to suppose that the last-mentioned statute rendered a deed necessary in any case in which it was not necessary before. The modern practice upon a voluntary partition is, if the property be freehold, to vest the entirety in a grantee to uses, which are separately declared of the portions taken in severalty by each party, so as to make him a purchaser; if the property be copyhold, it is similarly dealt with by means of a covenant by all parties to surrender, followed by a surrender accordingly of the different tenements or portions of tenements to be held in severalty; and if it be leasehold, then the portions taken in severalty by each party are directly assigned to him by the others, such assignment operating by way of release, as before observed. When the lands are incapable of being equally divided, the practice alluded to by Littleton (ss. 251 *et seq.*) of reserving a rent for equality is no longer followed, but that result is obtained by an immediate money payment. The last method of partition mentioned by Littleton is that by writ *de participatione faciendâ*, the word *participatione* being, however (according to Lord Coke), a misprint for *partitione*. By this writ partition amongst coparceners might have been constrained at the instance of any one of them without the consent of the others, and as the ancient law did not so constrain any other kind of joint owners, Littleton found in the existence of the writ an origin for the name *parceners*. The writ was abolished by the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27, s. 36); and at the present day compulsory partition between coparceners is effected through the Court (by virtue of the original equitable jurisdiction for that purpose, as modified under the Partition Acts) in the same manner as between other joint owners. Partition by consent can also now be effected under the Inclosure Acts, 1845 to 1882, through the Board of Agriculture, to whom by the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), have been transferred the powers of the Inclosure Commissioners. The foregoing observations apply generally, except where otherwise stated, to coparcenary by custom. It should be noticed that under the heading of "Parceners by Custome" Littleton mentions the Welsh gavelkind, which was confirmed by Statutum Wallie 12 Edw. I., but taken away by 34 & 35 Hen. VIII.; and the Irish gavelkind custom, also long since abolished, is referred to by Lord Coke. Littleton under this head also mentions (somewhat inappropriately as it would seem) a species of coparcenary which arose where a father seised of lands gave part to the husband of one of his daughters in frankmarriage. In this case, if the father died seised of the remnant, neither husband nor wife might share in such remnant without putting the lands given in frankmarriage into hotchpot. Gifts in frankmarriage, however, are now obsolete.

It remains to explain in greater detail the mode of descent of an estate in coparcenary. Under the Inheritance Act, 1833 (3 & 4 Will. IV. c. 106), descent is now in every case traced from the purchaser, except on total failure of his heirs—an event which is provided for by the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35, ss. 19, 20). And on failure of male issue of the purchaser, the inheritance descends to his female issue, who inherit together. Thus if A., the purchaser, die leaving two or more daughters and no son, the daughters inherit in equal shares as coparceners. So if A. die leaving a son and two or more daughters, and the son afterwards die without issue, the daughters inherit as coheirs of A. But if one of the daughters die leaving a son only, or daughters only, her share will descend, not to her son or daughters and her sister or sisters as coheirs of A., but to her son or daughters alone by right of representation (see *Cooper v. France*, 1850,

19 L. J. Ch. 313; *In re Matson*, [1897] 2 Ch. 509). These rules apply alike in cases of remoter relationship, *e.g.* where the purchaser dies without issue, without father and without brother, and the descent is traced through his father to his sisters. *Mutatis mutandis*, they apply also to descents according to the custom of gavelkind, which in Kent extends to collaterals, however remote (Robinson on *Gavelkind*, 5th ed. by Elton, p. 92); but it must be borne in mind that many lands in Kent have been disgavelled by Act of Parliament, and as regards descents elsewhere it should be noticed that the existence and extent of a custom of descent have always to be strictly proved (*In re Smart*, 1881, 18 Ch. D. 165). With respect to the application of the Inheritance Act, 1833, to customary descents, Sugden *R. P. Statutes*, 270, pl. 27; Wms. *R. P.*, App. B.; and *Shirt v. Shirt*, 1879, W. N. 33, may be referred to.

As regards the historical origin of coparcenary, it seems to be generally admitted that partible descents are of great antiquity throughout Europe and elsewhere, and that in ancient times the custom of partible descent was very widely spread. In England the custom of primogeniture, for which the Normans had everywhere a strong preference, was in the end generally established by them, but doubtless socage lands were partible before the Conquest, and continued to be so for a considerable time afterwards. Apparently coparcenary is a relic of this ancient custom of partibility. The customary division of socage lands amongst males perished, except in Kent, and by the usage of various manors elsewhere, but its division amongst females continued. Both modes of division exist in the typical custom of Kentish gavelkind, and always have so existed, as appears from the Statute De Prerogativa Regis, 17 Edw. II. c. 16, which states the rule to be that *omnes heredes masculi participant hereditatem similiter omnes fæminæ sed fæminæ non participant cum masculis*. See upon this subject, Maine's *Early History of Institutions* and Robinson on *Gavelkind*, 5th ed. by Elton.

Parchment—Skins of sheep dressed for writing. It is said to have been invented by Eumenes II., king of Pergamus (who reigned B.C. 197–159), in consequence of the prohibition of the export of papyrus from Egypt by Ptolemy Epiphanes. The probability is that some improvement was made in the manufacture at Pergamus, but Herodotus mentions writing on skins as common in his time. It is used for deeds; and before 1st November 1875 was also used for writs of summons.

Pardon.—The power of pardoning offences is one of the prerogatives of the Crown, and by 27 Hen. VIII. c. 24, s. 1, cannot be delegated to any subject within the realm; it is, however, one of the powers usually entrusted to colonial governors in their commissions. In England it is exercised upon the advice of the Secretary for State. Formerly all pardons were required to pass under the Great Seal, and this would still appear to be necessary in treason, murder, and misdemeanour (*R. v. Boyes*, 1861, 1 B. & S. 311). A sign-manual warrant or privy seal was, however, sufficient to justify the discharge of the prisoner, 1771, 1 Leach, 74; and it was formerly the practice to bail the prisoners on such sign-manuals to appear and plead the next general pardon that should come out. By 7 & 8 Geo. IV. c. 28, s. 13, in felonies not capital, a pardon may be granted by a sign-manual warrant, countersigned by a Secretary of State. Old statutes,

still unrepealed, require that where a pardon is granted at anyone's suggestion, the fact of such suggestion, and the name of the person making it, should be embodied in the pardon (27 Edw. III. stat. 1, c. 2); and that no pardon of treason, murder, or rape should be granted unless the offence be specified in the pardon (13 Rich. II. stat. 2, c. 1; 16 Rich. II. c. 6; 2 Hawk. P. C. c. 37, s. 2). A pardon obtained by false suggestion may be avoided. A pardon may be granted absolutely, or subject to a condition either precedent or subsequent; if the condition on which a pardon is granted be void, the pardon itself is void (*The Canadian Prisoner's case*, 1839, 3 St. Tri. N. S. 963, at p. 1034). A doubt whether the Crown had power to grant a conditional pardon for treason in Ireland against the will of the party, was removed by 12 & 13 Vict. c. 27.

A pardon may in law be granted either before or after trial and conviction. If granted before trial, unless it be by Act of Parliament, a pardon must be pleaded in answer to the indictment, or it is held to be waived.

There are certain restrictions on the power of pardoning. It is provided by the Act of Settlement (12 & 13 Will. III.) that no pardon under the Great Seal shall be pleadable in bar of an impeachment by the Commons of England. The precise effect of this section is discussed in *R. v. Boyes*, where a somewhat narrow construction was suggested by Blackburn, J. It was there held that a witness, who had received a pardon for corrupt practices at elections, could not refuse to answer on the ground that his answers might expose him to impeachment, without showing that there was some probability of an impeachment.

The Crown cannot remit the punishment of *premunire*, imposed by the Habeas Corpus Act, 1679, for the offence of committing to prison out of the realm.

Nor can the Crown make restitution of blood where the blood has been corrupted by attainder (*q.v.*), for that must be done by Act of Parliament, 3 Inst. 233.

Another restriction on the power of pardon arises from the operation of the legal maxim, *Non potest rex gratiam facere cum damno et injuria aliorum*. The Crown, it is laid down, cannot at common law pardon an offence against a penal statute after information brought, for thereby the informer has acquired a property in his part of the penalty; but there is now statutory power in certain cases to remit penalties, even though not payable to the Crown. It is also laid down that the Crown cannot pardon a common nuisance while it remains unredressed, or so as to prevent an abatement of it; nor can the Crown discharge a recognisance to keep the peace towards an individual.

As to the effect of a pardon, it is said by Hawkins, 2 P. C. c. 37, s. 45, that it does so far clear the party from the infamy and all other consequences of his crime, that he may not only have an action for a scandal in calling him a traitor or felon after the time of pardon, but may also be a good witness notwithstanding the attainder or conviction; because the pardon makes him, as it were, a new man, and gives him a new capacity and credit. And see *Cruddington v. Wilkins*, Hob. 67; *Layman v. Latimer*, 1877, 3 Ex. D. 15, 352. Hawkins also says (s. 37) that a pardon to a simonist coming into his church contrary to 31 Eliz. c. 6, or to an officer coming into his office by a corrupt bargain, may relieve from criminal prosecution, but will not enable the clerk to hold the church, or the officer to retain the office, because they are absolutely disabled by statute. However, in *Hay v. Justices of Tower, etc.*, 1890, 24 Q. B. D. 561, Pollock, B., and Hawkins, J., held that a pardon removed the disqualification to hold a spirit licence

imposed by 33 & 34 Vict. c. 29, s. 14, on every person convicted of felony. An earlier case (*R. v. Vine*, 1875, L. R. 10 Q. B. 195) had decided that this disqualification was not removable under the provision of 9 Geo. iv. c. 32, s. 3, that serving a sentence for a felony not capital shall have "the like effects and consequences as a pardon under the Great Seal."

General pardons in the nature of amnesties were formerly granted at coronations and on similar occasions, either by the Crown alone or by Act of Parliament, see 7 Geo. I. c. 29. Further information on this subject will be found in Hawkins.

Parent and Child.

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I. THE RELATION OF PARENT AND CHILD.

The legal relationship between a father and his legitimate infant children (see LEGITIMACY) includes that of guardian and ward. He has been called their guardian by nature and nurture, or, in more popular language, their natural guardian (*Wellesley v. Duke of Beaufort*, 1827, 2 Russ. 21; *In re Agar-Ellis*, 1883, 24 Ch. D. 317, 335; *Co. Litt.* 88 b, Hargrave's note (12)). After the father's death the mother is the natural guardian of her infant children, though at law she had no right to their custody against a testamentary guardian appointed by the father (*Eyre v. Countess of Shaftesbury*, 1722, 2 P. Wms. 103, 115; *Villareal v. Mellish*, 1737, 2 Swans. 533, 536; *Talbot v. Shrewsbury*, 1840, 4 Myl. & Cr. 672, 683). By the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), s. 2, she is now, however, on the death of the father, the guardian of her infant children, either alone or jointly with any guardian appointed by the father. For Guardianship, see the article on INFANTS, VII.

The bond of parent and child is not simply that of guardian and ward. The law acknowledges it to be one of a higher nature (see per Esher, M. R., *In re Agar-Ellis*, *supra*, at p. 327), and a parent has rights and duties which do not appertain to an ordinary guardian. Thus a father, unlike a guardian, has the right to say in which religion the children of the marriage shall be educated. It is the duty of a parent under the Poor Law to support his children while they are too young to maintain themselves; but no such duty has been imposed on a guardian.

A bastard is in law *nullius filius*. There is, strictly speaking, no legal relationship between him and his parents, neither of whom has the same right of guardianship which a father has in the case of his lawful children (see *post*, Custody of Illegitimate Children).

II. THE CUSTODY OF LEGITIMATE CHILDREN.

The father has a legal right to the custody and to control the education of his children, which right terminates when the latter attain the age of twenty-one (*In re Agar-Ellis*, 1883, 24 Ch. D. 317), or at any rate in the

case of daughters, marrying at an earlier age. It is a right which can only be forfeited by gross misconduct, or by conduct amounting to an abandonment of parental authority (*In re Agar-Ellis, supra*; *In re Newton*, [1896] 1 Ch. 740). An agreement, whether ante- or post-nuptial, by which the father surrenders it, is void as against public policy (*Vansittart v. Vansittart*, 1858, 2 De G. & J. Ch. 249; *Hamilton v. Hector*, 1871, L. R. 6 Ch. 701; *In re Violet Nevin*, [1891] 2 Ch. 299), with the exception that by the Custody of Infants Act, 1873 (36 Vict. c. 12), s. 2, an agreement in a separation deed that the mother shall have the custody of any child of the marriage, may be enforced, unless in the opinion of the Court it will not be for the benefit of the child to give effect to it. A father, however, who, in consideration of a legacy or other pecuniary benefit, gives up the custody of his children to another, can, while he retains the benefit, certainly not resume his parental control (*Potts v. Norton*, 1792, 2 P. Wms. 110 n; *Colston v. Morris*, Jac. 257 n.).

The law gave this right against a mother, as well as against others, even in respect of an infant at her breast (*R. v. De Manneville*, 1804, 5 East, 221). Under an Act of 1839 (2 & 3 Vict. c. 54), known as Talfourd's Act, the Court of Chancery had express power to take children under the age of seven out of the custody of the father or of a guardian appointed by him, and to give the custody of them to the mother until they attained that age. This Act was repealed and extended by the Infants' Custody Act, 1873 (36 Vict. c. 12), under sec. 1 of which the Court had a general power to give the mother the custody of her children until the age of sixteen. The result of these enactments was that whereas previously the Court never deprived the father of the custody of a child, unless he was absolutely unfit to remain its custodian, in cases under the Acts the Court also took into consideration the interest of the child and the father's behaviour in relation to his marital duty (*In re Halliday's Estate*, 1852, 17 Jur. 56; *In re Taylor*, 1876, 4 Ch. D. 157; *In re Elderton*, 1883, 25 Ch. D. 220).

Sec. 1 of the Infants' Custody Act, 1873, was repealed by the Statute Law Revision (No. 2) Act, 1893 (56 & 57 Vict. c. 54, sched. 2). It had previously been superseded by sec. 5 of the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), which empowers the Court, upon the application of the mother of any infant, to make such order as it may think fit regarding the custody of the infant, and the right of access thereto of either parent, having regard to the welfare of the infant and to the conduct of the parents, and to the wishes as well of the mother as of the father. The Court of Appeal has held that under this section the Court has full jurisdiction to override entirely the common law right of the father to the custody of his children (*In re A. & B.*, [1897] 1 Ch. 786).

Sec. 5 of the Summary Jurisdiction (Married Women) Act, 1895, enables a Court of summary jurisdiction, to which a married woman has made an application under the Act, to give her, as against her husband, the legal custody of their children while under the age of sixteen, except (s. 6) when she has been guilty of adultery not condoned or condoned to by him.

The Probate Division of the High Court, exercising the statutory jurisdiction of the Divorce Court, has extensive powers of dealing in matrimonial suits with questions of custody. Sec. 35 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), and sec. 4 of the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), gave the Divorce Court power in any suit for divorce, judicial separation, or nullity of marriage, to make interim or final orders with respect to the custody, education, and maintenance of the children of the marriage. The powers of the Divorce Court are now exercised by the

Probate, Divorce, and Admiralty Division of the High Court. Sec. 6 of the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), enables the Court, in a suit for the restitution of conjugal rights, to make orders for the same purpose. These statutory powers continue during the whole period of infancy (*Thomasset v. Thomasset*, [1894] Prob. 295, overruling *Blandford v. Blandford*, [1892] Prob. 148).

The Court has a wide discretion in exercising its jurisdiction under these Acts, as it is not bound either by the rules of the common law or those of equity (*Handley v. Handley*, [1891] Prob. 124, 127); but generally it has not interfered with the common law right of the father to have the custody of the children, except for good cause, while the guilt or innocence of the accused party is still undetermined (*Carlidge v. Carlidge*, 1862, 2 Sw. & Tr. 567, 31 L. J. P. 85; *Barnes v. Barnes*, 1867, L. R. 1 P. & D. 463). In making a final order, the paramount consideration with the Court is the interest of the children, and next the interest of the innocent party to the suit (*D'Alton v. D'Alton*, 1878, 4 P. D. 87, 88, 91). In general, though not invariably, when a wife succeeds in a suit against her husband, the custody of the children will be given to her (*Boynton v. Boynton*, 1861, 2 Sw. & Tr. 275, 30 L. J. P. 156); but it does not follow that the Court will deprive the father of the power of exercising parental judgment and discrimination with regard to his children, except so far as is inevitable from their remaining in the custody of their mother (*Maudslay v. Maudslay*, 1877, 2 P. D. 256). The Court will allow a third party to intervene in the matter of the custody of the children, and has placed them in the custody of such party, when it was of opinion that neither parent was fit to have charge of them (*Chetwynd v. Chetwynd*, 1865, L. R. 1 P. & D. 39). It will usually not make an order giving a divorced wife access to her children (*Handley v. Handley*, [1891] Prob. 124).

By sec. 7 of the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), the Court, in granting a judicial separation or divorce, may declare the parent, against whom the decree is made, unfit to have the custody of the children; and then he or she shall not, upon the death of the other parent, be entitled as of right to their custody or guardianship (see *Skinner v. Skinner*, 1888, 13 P. D. 90).

(See further, as to the principles on which the Court acts in matrimonial suits, Browne and Powles' *Law of Divorce*, 7th ed., c. 9; Dixon's *Law of Divorce*, 2nd ed., c. 11.)

There are some other statutory provisions by which, in the case of his misconduct, a father's parental rights are affected. By sec. 12 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), if it be proved on the trial of any offence under the Act that a parent or guardian has encouraged the seduction or prostitution of a girl under sixteen, the Court may divest him of all authority over the girl.

By the Poor Law Act, 1889 (52 & 53 Vict. c. 56), s. 1, subss. 1, 4, where a child has been deserted by its parent, or the parent is in penal servitude or imprisoned in respect of an offence against the child, and the child is maintained by the guardians of any union, the guardians may resolve that the child shall be under their control, until the age of sixteen if a boy, and of eighteen if a girl. Thereupon, until the child reaches that age, all the powers and rights of the parent vest in the guardians. They may, however, rescind the resolution or allow the child to be permanently or temporarily under the control of the parent, or of a relative or friend.

Under the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41, s. 6), any person having the custody of a child under the age of sixteen,

who, by any Court, has been convicted of any of certain specified offences in respect of the child, or committed for trial for any such offence, or bound over to keep the peace towards the child, may be deprived by the Court of the custody of the child. By sec. 7 the child shall, while the order of the Court is in force, remain in the custody of the person to whom it has been confided, notwithstanding that it is claimed by its parent, provided that a parent of the child has been a party to the offence, or also bound over to keep the peace towards the child. For the definition of parent, see sec. 23 (see also the Custody of Children Act, 1891, 54 Vict. c. 3, *post*).

The right of the father or other person entitled to the legal custody of an infant can, when it is infringed, be enforced by a writ of *habeas corpus*. The ground on which the writ is issued is that the person to whom it relates is detained in illegal custody, and therefore the writ will not be issued if the Court find that the person, being of an age at which he is capable of consenting, consents to the custody in which he is. The age at which an infant is deemed to have capacity to consent is fourteen for a male, sixteen for a female (*In re Shanahan*, 1852, 20 L. T. 183; *R. v. Howes*, 1860, 3 El. & El. 332, 30 L. J. M. C. 47; per Brett, M. R., *In re Agar-Ellis*, 1883, 24 Ch. D. 317, 326). Mr. Eversley suggests (*Domestic Relations*, 2nd ed., p. 500) that the choice of an infant not to return to a parent or guardian must be a wise one, and for his interest. Thus, if a girl over sixteen, but under twenty-one, were voluntarily to remain in a brothel, there can, he says, be no doubt that the father would be assisted by the Court to resume his parental control (see *Hall v. Hall*, 1749, 3 Atk. 721, a case in which the Court of Chancery assisted a guardian to compel a boy of sixteen to return to Eton).

The writ of *habeas corpus* is a common law remedy, though the Court of Chancery had power to issue it. The only question which could formerly be considered on the application was that of the legal custody of the child, and the Court had no discretion to refuse the writ to the father, except there were an apprehension of cruelty to the child, or of contamination in consequence of his gross immorality (per Cur, *In re Andrews*, 1873, L. R. 8 Q. B. 153, 158; see also *R. v. Clarke*, 1857, 7 El. & Bl. 186; the cases cited in Eversley's *Domestic Relations*, 2nd ed., p. 498; and in Simpson, *Infants*, 2nd ed., p. 140; and HABEAS CORPUS).

The Court of Chancery, however, had a different jurisdiction in relation to the custody of children,—a paternal jurisdiction on behalf of the Crown as the guardian of all infants, and which was not limited to the case of wards of Court (*In re Spence*, 1847, 2 Ph. Ch. 247; *R. v. Gyngall*, [1893] 2 Q. B. 232; *In re McGrath*, [1893] 1 Ch. 143). The proper procedure was by petition, and in the exercise of this jurisdiction the Court was not bound by the rules of the common law, but was able to a much greater extent to consider the welfare of the infants (see *Lyons v. Blenkin*, 1820, Jac. 245, where the Court ordered an application for a *habeas corpus* to stand over to enable a petition to be presented. If necessary, it would also restrain a father from prosecuting a writ in another Court). By sec. 25, subsec. 10 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), in questions relating to the custody and education of children, the rules of equity shall prevail. The consequence is that on application by *habeas corpus* for the custody of children, the Court is able to exercise the chancery jurisdiction, and it has refused the writ even to a parent who had been guilty of no misconduct, being satisfied that this course was essential to the welfare of the child (*R. v. Gyngall*, [1893] 2 Q. B. 232; see also *In re Ethel Brown*, 1884, 13 Q. B. D. 614).

The Custody of Children Act, 1891 (54 Vict. c. 3), also affects the right of a parent to obtain a writ of *habeas corpus*. Sec. 7 expressly gives the Court a discretion to refuse a writ when the parent has abandoned or deserted the child, or otherwise misconducted himself. Further, by sec. 3, where a parent has abandoned or deserted his child, or allowed it to be brought up by another person, or an institution, or a poor-law union, under circumstances showing that he was unmindful of his parental duties, the Court must not order the child to be delivered up unless the parent satisfies it that he is a fit person, having regard to the welfare of the child, to have the custody of it. By sec. 5, "parent" includes any person at law liable to maintain a child or entitled to its custody.

Under its Chancery jurisdiction the Court will interfere with a father's control of his children on the ground of his unfitness; but it must be satisfied that he has so conducted himself, or has shown himself to be a person of such a description, as to render it not merely better for the children, but essential to their safety or welfare, that his rights should be superseded (per Knight-Bruce, V.C., *In re Fynn*, 1848, 2 De G. & Sm. 457, 474; *In re Curtis*, 1859, 28 L. J. Ch. 458).

The following have been held to be good grounds for interference with the paternal control:—The father's living in adultery and encouraging his children in swearing and keeping bad company (*Wellesley v. Wellesley*, 1827, 2 Bli. N. S. 124; 31 R. R. 15); his constant debauchery and open adultery (*Warde v. Warde*, 1849, 2 Ph. Ch. 786); his profession of irreligious opinions, coupled with immorality (*Shelley v. Westbrook*, 1821, Jac. 266; see also *Thomas v. Roberts*, 1850, 3 De G. & Sm. 758, 19 L. J. Ch. 506); his dissolute character, together with a second marriage with a person socially much his inferior (*In re Cormicks*, 1840, 2 Ir. Eq. 264); his cruelty to the children (*Whitfield v. Hales*, 1806, 12 Ves. 492); his having committed a criminal assault upon his daughter (*Swift v. Swift*, 1865, 11 Jur. N. S. 148, 458); his having committed an unnatural crime, though not convicted of it (*Anon.*, 1851, 2 Sim. N. S. 54); his habitual drunkenness and blasphemy, or use of improper language, poisoning the mind of the infant (case cited by Lord Eldon, 10 Ves. 61; *In re Goldsworthy*, 1876, 2 Q. B. D. 75, 84). Habitual drunkenness to such an extent as to render him incapable of exercising control over his children may justify the interference of the Court (see *Carnegie's case*, cited 11 Ch. D. 512).

The following have been held not to be sufficient grounds for interference:—A father's occasional acts of severity or outbreaks of passion (*Blake v. Lord Wallscourt*, 1846, 7 L. T. O. S. 545; *In re Curtis*, 1859, 28 L. J. Ch. 458, 467); his living in adultery, where he was careful not to bring his children into contact with his paramour (*Ball v. Ball*, 1827, 2 Sim. 35); his occasional incontinence or mere habits of intemperance (*In re Goldsworthy*, 1876, 2 Q. B. D. 75); his conduct which made it impossible for his wife to live happily with him, but was not such as to corrupt the morals of his children (*In re Spence*, 1847, 2 Ph. Ch. 247).

As to whether the refusal to give a religious education to children makes him unfit to have their custody, see *post*.

Under this jurisdiction the Court may also interfere with a father's right when his circumstances are such as to render it essential that these rights should be suspended or treated as lost (*In re Fynn*, 1848, 2 De G. & Sm. 457, 477; *R. v. Gyngall*, [1893] 2 Q. B. 232).

Poverty in itself is no ground for interfering with parental rights (*In re Curtis*, 1859, 28 L. J. Ch. 458, 463), though it may be considered together with other circumstances, such as outlawry and residence abroad (*Cruze v.*

Hunter, 1790, 2 Cox, 242), or the application of a child's income by the father to his own use (*Ex parte Mountford*, 1808, 15 Ves. 445). When, however, a parent is not only poor, but in such a position that he will not be able to make a home for his children, and they are out of his custody, the Court may in their interest refuse to make an order for them to be given up to him (*R. v. Gyngall*, *supra*).

The Court of Chancery held that a father may lose his parental rights by waiver.

An agreement to give up the control of his children to another person, as has already been said, is not in itself binding on him. Nor if a provision be made for, or a legacy bequeathed to, a child on condition that the father shall renounce his rights, can he be obliged to accept the condition (*Ex parte Hopkins*, 1732, 3 P. Wms. 152, 154). When, however, a father has given up the control of his children and allowed them to be provided for by another person in a manner which he cannot afford, he will not be allowed to disappoint their expectations and resume his control (*Lyons v. Blenkin*, 1821, Jac. 245; *Hill v. Gomme*, 1839, 8 L. J. Eq. 350). Nor, if he has surrendered the custody of his children for a pecuniary benefit, will he be allowed to resume it, at any rate while he retains the benefit (*Potts v. Norton*, 1729, 2 P. Wms. 110 n.; *Blake v. Leigh*, 1756, Amb. 306).

The Court will prevent a father from removing his children, being wards of Court, out of the jurisdiction, without its consent, though it does not in other respects interfere with his parental authority, except when he has forfeited his rights by misconduct or by abdication of his control (*In re Plomley*, 1882, 47 L. T. 284; *In re Agar-Ellis*, 1883, 24 Ch. D. 317).

The Court will, however, allow its ward to be taken out of the jurisdiction, if satisfied that the step is for the benefit of the ward and that there is sufficient security that future orders will be obeyed (*In re Callaghan*, 1884, 28 Ch. D. 186). It may require an undertaking that the ward shall not contract a marriage without its consent (*ibid.*). Generally, a parent who is obliged by duty or ill-health to reside abroad will be allowed to have his children with him (*Anon.*, Jac. 265; *Lyon v. Watson*, 1840; Chamber's *Infants*, p. 32; *In re Thomas*, 1853, 22 L. J. Ch. 1075); but the Court may require a scheme of education for its wards to be drawn up, or to be given particulars from time to time of the manner in which they are being educated (*Anon.*, Jac. 265; *Campbell v. Mackay*, 1837, 2 Myl. & Cr. 31).

Where it would be prejudicial to the ward to be taken out of the jurisdiction the Court will refuse its consent, and, if necessary, interfere by injunction (*In re Plomley*, 1882, 47 L. T. 283).

During the life of the father, the theory of the law is that the mother, as such, is entitled to no power, but only to reverence and respect (1 Bl. Com. 453). The Court of Chancery might, if it deprived the father of his control over his children, give the custody of them to the mother. Whatever other rights of custody she possesses have been given by statutes which have already been noticed.

After the death of the father the mother is the natural guardian of her children. As such she has, where the father has not appointed a guardian, the same right to have the custody of her children as the father had in his lifetime, and the same remedies to enforce her rights (*Eyre v. Countess of Shaftesbury*, 1722, 2 P. Wms. 103, 115; *Villareal v. Mellish*, 1737, 2 Swans. 533; *R. v. Clarke*, 1857, 7 El. & Bl. 186, 26 L. J. Q. B. 169; *R. v. Gyngall*, [1893] 2 Q. B. 232). Like the father, she is not bound by an agreement to give up her parental rights (*Barnardo v. M'Hugh*, [1891] App. Cas. 388).

Where the father had not appointed a testamentary guardian, the Courts of Equity would also, of course, appoint her as guardian to her infant children (per Stirling, J., *In re Scanlan*, 1888, 40 Ch. D. 200, 212); but she had no right, except under the Custody of Children Acts, to interfere with a testamentary guardian (*ibid.*, *Talbot v. Earl of Shrewsbury*, 1840, 4 Myl. & Cr. 672).

Now, by sec. 2 of the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), she is, as has already been said, on the death of the father, the guardian of her infant children, either alone or jointly with any guardian appointed by the father. As such, and under sec. 5, she is in general entitled to have the custody of them (*In re Russell*, L. T. 16 July 1887). The mother may naturally forfeit the right of custody on any of the grounds which will induce the Court to deprive a father of his parental rights (*In re Moore*, 1859, 11 Ir. C. L. 1; *R. v. Gyngall*, *supra*, where a mother was not allowed to resume control of her child; see also *Roach v. Garvan*, 1748, 1 Ves. 158, where a mother was removed from her guardianship for trying to bring about an improper marriage for her daughter, a ward of Court).

In general (see *post*), children must be brought up in the religion of the father. The fact that the mother professes a different religion is no reason for not allowing her to have the custody of her children (*Austin v. Austin*, 1865, 34 Beav. 257, 4 De G., J. & S. 716); but she may be restrained from bringing them up in her own faith (*In re Newbery*, 1866, L. R. 1 Ch. 263), or if she avows the intention of doing so, may forfeit the right to have charge of them (*D'Alton v. D'Alton*, 1878, 4 P. D. 87; see also *In re Besant*, 1879, 11 Ch. D. 508).

A mother's right of custody, like a father's, is affected by the Criminal Law Amendment Act, 1885, s. 12; the Guardianship of Infants Act, 1886; the Poor Law Act, 1889, s. 1, subss. 1, 4; and the Cruelty to Children Act, 1894, s. 6 (*ante*).

The father having the custody of his child may delegate part of his parental authority to a third person, such as a tutor or schoolmaster, who is then as against other persons *in loco parentis*, and has such a portion of the power of the parent, namely, that of restraint and correction, as may be necessary to answer the purposes for which he is employed (1 Bl. Com. 453). The mother, when the custody of a child has been given to her during the father's life, has no doubt this power of delegation, subject to the control of the Court. After the death of the father, she has, as guardian, the same power (*Talbot v. Shrewsbury*, 1840, 4 Myl. & Cr. 672, 685). In case of a difference of opinion between her and a testamentary guardian appointed by the deceased father, as to the schoolmaster or other person in whose charge the child shall be placed, the Court may be applied to for its direction (Guardianship of Infants Act, 1886 (40 & 50 Vict. c. 27), s. 3, subs. 3).

III. THE CUSTODY OF ILLEGITIMATE CHILDREN.

A bastard is in the eye of the law *nullius filius*, and neither the mother nor the putative father has the legal right of guardianship which a father has in the case of a child born in wedlock (Macpherson on *Infants*, p. 67, citing *R. v. Felton*; *R. v. Hopkins*, 1806, 7 East, 579; *R. v. Clarke*, 1857, 7 El. & Bl. 186, 198; *R. v. Uller*, 1886, 54 L. T. 286). The law, however, recognised that the mother has some right to the custody of an illegitimate child. In *Barnardo v. M'Hugh*, [1891] 1 Q. B. 194, the Court of Appeal held that the right was the same as the law gives to the father of a legitimate child; but this was doubted in the House of Lords ([1891] App. Cas.

388). The mother's right has frequently been enforced by *habeas corpus*, though in most of the cases the child was within the age of nurture, or had been taken from the mother by force or stratagem (*R. v. Soper*, 1798, 5 T. R. 278; *R. v. Moseley*, 1798, 5 East, 224 n; *Ex parte Knee*, 1804, 1 Bos. & P. N. R. 148; 8 R. R. 772; *R. v. Hopkins*, *supra*). There is a dictum of Lord Kenyon's that the custody of the putative father would not be interfered with if he had obtained possession of the child by fair means (*R. v. Moseley*, *supra*); and in one case the Court, as against him, refused the application of the mother for the possession of an unwilling child aged about eleven (*In re Lloyd*, 1841, 3 M. & G. 547). In connection, however, with all these cases of *habeas corpus*, two things must be borne in mind. One is that as regards the custody of children the rules of equity must prevail (see *ante*, *Custody of Legitimate Children*). The other is that in 1834 the Legislature imposed on the mother an obligation to maintain her illegitimate child until it reaches the age of sixteen (4 & 5 Will. IV. c. 76, s. 71). This obligation, said the House of Lords in *Barnardo v. M'Hugh*, [1891] App. Cas. 388, 395, 398, ought to give her a corresponding right of custody. In that case, following *R. v. Nash*, 1883, 10 Q. B. D. 454, it was decided that the Court, applying equitable rules, must now have regard to the mother, the putative father, and the relations on the mother's side. Their natural relationship gives a right to the custody of the child; but the mother's right must be preferred and her wishes consulted, unless the welfare of the child makes it imperative that they should be disregarded.

It has been decided in Scotland that the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), does not apply to illegitimate children (*Brand v. Shaw*, 1888, 16 Ct. of Sess. Cas. 4th Ser. 315, 320).

Under the Divorce Acts the Court has power in a suit for nullity of marriage to make orders for the custody, maintenance, and education of the children (*ante*).

The word "parent" in the Custody of Children Act, 1891 (54 Vict. c. 3), and the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), includes any person at law liable to maintain such child or entitled to his custody. As the mother of a bastard is liable to maintain him (*post*), her right of custody is clearly affected by the provisions of these Acts, for which see *ante*.

IV. THE MAINTENANCE OF CHILDREN.

There is no common law duty on the part of a parent to support his children (per Cockburn, C.J., *Bazeley v. Forder*, 1868, L. R. 3 Q. B. 559, 565). The moral duty of a father to maintain and educate his children has been constantly recognised by the Courts, but neither the Courts of law nor those of equity had any direct means of enforcing this duty (Simpson, 2nd ed., p. 171). The poor laws have, however, provided the means of making a parent contribute to the support of his children. Sec. 7 of the first Act (43 Eliz. c. 2) provided that the father and grandfather, mother and grandmother, and children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of a sufficient ability, shall at their own charges relieve and maintain every such poor person in the manner therein provided. This provision does not apply to relations by affinity but only to blood relations (*Tubb v. Harrison*, 1790, 4 T. R. 118; *Cooper v. Martin*, 1803, 4 East, 76). It can only be put in force in favour of a person who has become chargeable to the parish. By 31 & 32 Vict. c. 122, s. 36, an order of maintenance must be made by justices for the parish in question, and is enforced under 11 & 12 Vict. c. 43.

Indirectly the obligation can also be enforced by the criminal law. Under 31 & 32 Vict. c. 122, s. 37, a parent who wilfully neglects to provide adequate food, clothing, medical aid, or lodging to his child, being in his custody, under the age of fourteen, whereby the health of the child has been or is likely to be seriously injured, is liable to imprisonment.

The primary liability under 43 Eliz. c. 2 is on the father and grandfather, and no order for maintenance used under it to be made on a *feme covert*. (*Custodes v. Jinks*, 1652, Sty. 283). Further, as the statute only affected blood relations, if a mother married for the second time, her husband was not bound to maintain his step-children. By sec. 57 of 4 & 5 Will. IV. c. 76, however, every man who marries is liable to maintain his wife's children, whether legitimate or illegitimate, until they become sixteen years old, or until the death of the mother before they reach that age. The Married Women's Property Acts have greatly altered the law so far as the obligation of a married woman to maintain her children is concerned. Under sec. 21 of the Act now in force, that of 1882 (45 & 46 Vict. c. 75), a married woman having separate property is subject to the same liability as her husband for the maintenance of her children and grandchildren, but without relieving him from any existing liability.

The Probate Division has power under the Divorce Acts to make orders for the maintenance of the children by the father or out of the mother's settlement (20 & 21 Vict. c. 85, ss. 35, 45; 22 & 23 Vict. c. 61, s. 4; *Seattle v. Seattle*, 1860, 30 L. J. P. M. & A. 216; *Milford v. Milford*, 1869, L. R. 1 P. & D. 715).

Illegitimate children are not within the Act of Elizabeth, but under 4 & 5 Will. IV. c. 76, s. 71, the mother of an illegitimate child, while a widow or unmarried, is liable to maintain the child until it reaches the age of sixteen, or, if a female, marries. By sec. 57, as has been said, if she marries, her husband is also liable to maintain her illegitimate as well as her legitimate children (*supra*).

By 35 & 36 Vict. c. 65, the putative father of an illegitimate child may be ordered by the justices to pay to the mother or to the person having the custody of the child a weekly sum not exceeding five shillings for its maintenance and education, until it attains the age of sixteen or for a shorter period (*Pearson v. Heys*, 1881, 7 Q. B. D. 260). An order cannot be made under this Act after the mother has married (*Stacy v. Lintell*, 1878, 4 Q. B. D. 291; *Tozer v. Lake*, 1879, 4 C. P. D. 322); but when an order has been made it can be enforced against the putative father, notwithstanding the subsequent marriage of the mother (*Hardy v. Atherton*, 1881, 7 Q. B. D. 264. See further, AFFILIATION).

An agreement between the mother and the putative father of an illegitimate child, that in consideration of a payment by him she will maintain the child, is valid (*Smith v. Roche*, 1859, 28 L. J. C. P. 237).

Under 29 & 30 Vict. c. 117, s. 25, and 29 & 30 Vict. c. 118, s. 39, the parent, step-parent, or other person liable to maintain a child detained in a reformatory or industrial school may be ordered to contribute a sum not exceeding five shillings a week to his maintenance. Cp. 57 & 58 Vict. c. 41, s. 7 (2).

The moral obligation to maintain a child does not make a father liable for debts incurred by the latter, even for necessities (*Mortimore v. Wright*, 1840, 6 Mee. & W. 482). If he turn his son upon the world, it is said that the son must apply to the parish (*Shelton v. Springett*, 1851, 11 C. B. 452, 455). The father is, however, liable for debts which he has given the child authority to incur, or which he has himself contracted to pay, and an authority may be inferred from his conduct (*Mortimore v. Wright, supra*).

Thus where a father allowed his son to enter the army, an authority for him to buy regimentals was inferred (*Baker v. Keen*, 1819, 2 Stark. 501). Mere knowledge, however, that an infant child is being maintained by a third person does not establish an authority for the child to incur debts to that person for necessities (*Mortimore v. Wright*, *supra*, disapproving *Nichol v. Allen*, 1827, 3 Car. & P. 36). An authority to pledge a father's credit will naturally be more easily inferred when the debt is for necessities than when it is for things not necessary; but such an authority cannot be implied when the father gives a child a sufficient allowance (*Crantz v. Gill*, 1796, 2 Esp. 471).

Where a father has allowed his children to live with the mother after a separation, or with a servant, it has been held at *nisi prius* to be a question for the jury whether the latter has an implied authority to contract for necessities for them (*Rawlyns v. Vandyke*, 1800, 3 Esp. 250; *Cooper v. Phillips*, 1831, 4 Car. & P. 581). Where, on the other hand, a wife, leaving her husband on account of his cruelty, took the children with her, under circumstances which did not show consent on his part, Lord Kenyon was of opinion that he was not liable for necessities for them (*Hodges v. Hodges*, 1796, 2 Pea. 79). In *Bazeley v. Forder* (1868, L. R. 3 Q. B. 559), however, where a wife having justifiably left her husband obtained an order under 2 & 3 Vict. c. 54, for the custody of their child, the Court of Queen's Bench held that the reasonable expenses of providing for it were part of the reasonable expenses of the wife for which she was entitled to pledge his credit. Chief Justice Cockburn dissented from this decision, which indeed seems to have strained the law to escape from the logical consequences of an iniquitous principle.

The Court of Chancery, considering that it was the duty of a father to maintain his infant children while in his custody, did not generally grant him an allowance for their support out of a fund available for the purpose (per Lord Eldon, *Wellesley v. Beaufort*, 1827, 2 Russ. 1, 28; 31 R. R. p. 22). The Court, however, has allowed maintenance to a father where there is a marriage settlement containing a trust for maintenance (*Mundy v. Howe*, 1793, 4 Bro. C. C. 223), where the father could not support his child in a manner suitable to the latter's expectations (*Buckworth v. Buckworth*, 1784, 1 Cox, 80), and when to refuse maintenance would have been a hardship on the other children of the family (*Hoste v. Pratt*, 1798, 3 Ves. 730). As to maintenance, see further, INFANTS, vol. vii.

On the same principle no allowance will be made to a father for the past maintenance of his children except under special circumstances, as where he is impecunious, or has incurred debts for their maintenance, or is unable to maintain them, having regard to other children for whom there is no provision (*Ex parte Bond*, 1833, 2 Myl. & K. 439; *Carmichael v. Hughes*, 1851, 20 L. J. Ch. 396; *In re Hodges*, 1878, 7 Ch. D. 754; *Ex parte Penleaze*, 1805, 1 Bro. C. C. 387 n.).

The Court of Chancery would allow maintenance to a mother who had the custody of her children, out of an available fund, regardless of the fact that she had sufficient means to support them (*Douglas v. Andrews*, 1849, 12 Beav. 310; see also *Haley v. Bannister*, 1819, 4 Madd. 275). It has been suggested that as sec. 21 of the Married Women's Property Act, 1882, makes a married woman who has separate estate liable to maintain her children, a married woman would now be refused an allowance by the Court in any case in which it would be refused to the father (*Eversley, Domestic Relations*, 2nd ed., p. 650; *Simpson*, 2nd ed., p. 313 n. (y)). The writer doubts whether that section will have such an effect. The reason

why the Court refuses maintenance to a father is that he is under a moral duty to support his children while they are in his charge, not that by means of the poor law he can be forced to pay for their sustenance. Apparently no such duty has been recognised by the Court in the case of the mother; for a widow has been granted maintenance for her children without reference to her means (*Douglas v. Andrews, supra*).

V. THE MAINTENANCE OF PARENTS.

The duty of a child to maintain his parents when they are incapable of supporting themselves was not recognised by the common law as being other than a moral duty. Under the poor law, however, children whose parents are poor and unable to work are, when of sufficient ability, liable to maintain them (43 Eliz. c. 2, s. 7, *ante*). Consequently, when a parent through poverty and inability to work becomes chargeable to the parish, an order for his maintenance can be made on his children, under 11 & 12 Vict. c. 43 (see *ante, Maintenance of Children*).

There is no legal duty to support grandparents, corresponding to the liability which 43 Eliz. c. 2 imposes on grandparents to maintain their grandchildren (*Maunder v. Mason*, 1874, L. R. 9 Q. B. 254); nor is there any obligation to maintain a stepfather or stepmother, as the Statute of Elizabeth only applies to natural relations (*Tubb v. Harrison*, 1790, 4 T. R. 118; *Cooper v. Martin*, 1803, 4 East, 76, 84).

VI. THE EDUCATION OF CHILDREN—(a) SECULAR; (b) RELIGIOUS.

(a) At common law a parent was under no obligation to have his child educated (*Hodges v. Hodges*, 1796, Pea. Add. Ca. 79). The only liability to do so is that imposed by the Elementary Education Acts. Under the Acts of 1870 and 1880 (33 & 34 Vict. c. 75, s. 74, and 43 & 44 Vict. c. 23, s. 2), the local authority must make by-laws for the attendance of children between the ages of five and thirteen years at school, when they are not under efficient instruction elsewhere. What constitutes efficient instruction is explained by sec. 4 of the Act of 1876 (39 & 40 Vict. c. 79), which declares that it is the duty of a parent, under a penalty, to cause his child to receive instruction in reading, writing, and arithmetic. A parent who allows a child to reside with another person is not thereby freed from responsibility under that section, although in the interpretation clause the person having the actual custody of the child is liable (*School Board for London v. Jackson*, 1881, 7 Q. B. D. 502). Under the Act of 1893 (56 & 57 Vict. c. 51), a child of eleven who has reached a certain standard of efficiency may be exempted from attendance at school.

Whatever the rank or position of the parents, there is no legal obligation on them to give their children an education other than the above-mentioned one. The Court will, however, take care that its wards are educated in a manner suitable to their expectations (*Powel v. Cleaver*, 1789, 2 Bro. C. C. 499; *Anon.* Jac. 265; *Campbell v. Mackay*, 1837, 2 Myl. & Cr. 31). A guardian is under a duty to give his ward a suitable education. See INFANTS, vol. vii.

(b) The Education Acts do not impose any obligation on parents to let their children receive religious instruction; nor, as will presently appear, is there any decision that a father is bound to bring up his children in any religious belief (see *post*). Yet in this country children are almost invariably brought up to profess some religion.

The fundamental rule with regard to their religious training is that the father has the right to decide in what religion his children shall be educated

(*Talbot v. Earl of Shrewsbury*, 1840, 4 Myl. & Cr. 672; *In re Agar-Ellis*, 1878, 10 Ch. D. 49), and no promise or agreement by which he undertakes that they shall be brought up in a particular religion is binding on him (*Andrews v. Salt*, 1873, L. R. 8 Ch. 622; *D'Alton v. D'Alton*, 1878, 4 P. D. 87; *In re Violet Nevin*, [1891] 2 Ch. 299). Even when the father changes his religion, his right to bring up his children in his new faith is recognised (*D'Alton v. D'Alton*, *supra*). His right has not been affected by the Guardianship of Infants Act, 1886 (*In re Scanlan*, 1888, 40 Ch. D. 200; *In re M'Grath*, [1893] 1 Ch. 143, 148), and is safeguarded by the Custody of Children Act, 1891 (54 Vict. c. 3, s. 4), and the Poor Law Acts. See the Poor Law Act, 1886 (52 & 53 Vict. c. 56, s. 1, subs. 6, and sched.).

The father can, however, forfeit this right by his own conduct. There is no case in which a living father who is allowed to retain the custody of his children has been interfered with in their religious training. Where, however, the conduct of a father had amounted to an abdication of his rights, and the children were out of his custody, and he had for years allowed them to be brought up in a religion other than his own, and the Court thought it would be injurious to their welfare that their religious training should be altered, his application to have them brought up in his religion was refused (*In re Newton*, [1896] 1 Ch. 740).

After the death of the father, if he should have left no directions as to their religious education, it is presumed that he wished them to be brought up in his own religion, in the absence of evidence to the contrary (*Hawksworth v. Hawksworth*, 1871, L. R. 6 Ch. 539; *per cur. In re M'Grath*, [1893] 1 Ch. 143, 148). Even the mother, if they be in her custody, will be prevented by the Court from educating them in a different faith (*Hawksworth v. Hawksworth*, *supra*; *In re Montagu*, 1884, 28 Ch. D. 82). When, however, a child has after his father's death been so long brought up in another religion for such a time and until such an age that it has made a deep impression, and an attempt to alter his views might unsettle his religious faith altogether, the Court will not interfere with the child's religious training (*Stourton v. Stourton*, 1857, 8 De G., M. & G. 760; *In re Browne*, 1858, 8 Ir. Ch. 172; *Hawksworth v. Hawksworth*, 1871, L. R. 6 Ch. 539, 542). In *Stourton v. Stourton* the Vice-Chancellor had an interview with a child nine and a half years old, to ascertain its state of mind; but such an inquiry in the case of a young child was strongly condemned in *Hawksworth v. Hawksworth*, where the Court held that the views of a child of eight might be disregarded. In one case the Court of Chancery ordered that the mother of a boy of fifteen should not continue to take him to a chapel of the Plymouth Brethren (*In re Newbery*, 1866, L. R. 1 Ch. 263), while in an Irish case the Lord Chancellor refused to interfere with the training of a girl of the same age (*In re Browne*, *supra*).

Where a deceased father had waived his rights to have his children brought up in his faith or had shown indifference as to their religious training, the Court will exercise a wider discretion, and be guided entirely by a consideration for their welfare (*Andrews v. Salt*, 1873, L. R. 8 Ch. 622; *In re M'Grath*, [1893] 1 Ch. 143). "But the welfare of a child is not to be measured by money only, nor by physical comfort only. . . . The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded" (*per cur. ibid.*, p. 148). In such a case where one child of the family is too old for interference with his or her religious views, the Court may think it not for the welfare of the younger children that they should be brought up in a

different religion from the eldest child (*ibid.*; *In re Newton*, [1896] 1 Ch. 740). Even an express direction in a father's will has been disregarded, where he had previously agreed to or acquiesced in their being brought up in the mother's religion (*Hill v. Hill*, 1862, 31 L. J. Ch. 505; *Andrews v. Salt*, *supra*).

The Court in deciding whether a child shall be brought up in its father's religion is not concerned with the tenets of that religion, except, in the words of Lord Eldon, so far as the law of the country calls on it "to look on some religious opinions as dangerous to society" (*Lyons v. Blenkin*, 1821, Jac. 245; 23 R. R. 38). On this principle the criticism in *In re Newbery* (1866, L. R. 1 Ch. 263) of the doctrines of the sect to which the mother belonged would not have been justifiable, if the mother's rights in the matter were the same as the father's.

There is no case in which it is decided that it is the duty of a father to bring up his children in any religion (Eversley, *Domestic Relations*, 2nd ed., p. 523; Simpson, *Infants*, 2nd ed., p. 149); and in spite of Lord Justice Knight-Bruce's dictum in *Thomas v. Roberts* (1850, 3 De G. & Sm. 758; 19 L. J. Ch. 506, 512), it is doubtful whether a father would be deprived of the custody of a child because he refused to allow it to be taught any religious belief, when there was no question of immoral behaviour on his part, or of his holding immoral views, or of other special circumstances in the case. Lord Eldon, however, observed in *De Manneville v. De Manneville* (1804, 10 Ves. at p. 58), that the Court had interfered to prevent parents from preaching irreligious doctrines in the presence of their families; and in *Shelley v. Westbrook* (1821, Jac. 266; 23 R. R. 47) he restrained a father who professed atheistical opinions from taking possession of his children; but the father had deserted his family and avowed opinions which the Court stigmatised as immoral and vicious. In *Thomas v. Roberts* (*supra*) a similar order was made, where the father had deserted his wife before the birth of the child, and obviously, in the opinion of the Court, was leading an immoral life. These cases, therefore, do not touch the point; but in *In re Besant* (1879, 11 Ch. D. 508), a mother who professed atheistical opinions, and who, having the custody of her daughter under a deed of separation made between her and her husband, refused to allow the child to receive religious instruction, was deprived of such custody. The decision, however, was not based simply on the ground of the manner in which the child was being educated. There was the additional fact that the mother had been convicted of publishing an obscene book, though in the opinion of the jury without any corrupt motive. Sir George Jessel decided the case mainly on the ground that it would not be for the benefit of the child to enforce the agreement in the separation deed (see 36 Vict. c. 12, s. 2, *ante*). The Court of Appeal held that the child being a ward of Court, it was the duty of the Court to bring her up in the religion of her father, a duty which was not affected by the fact that the deed had given the custody to the mother. There can, however, be no doubt that sec. 5 of the Guardianship of Infants Act, 1886, would justify the Court in the interest of a child in giving the custody of it to the mother, so that it might receive a religious education which the father refused to give it. In the opinion of the writer, it is also safe to say that after the death of a father the Court would not compel obedience to his wish that his children should not be brought up in any religion.

See also Simpson, *Infants*, 2nd ed., pp. 129–136; and an article on the "Religious Education of Children," by Mr. J. H. Jackson, *Law Quarterly Review*, October 1896.

VII. VARIOUS RIGHTS OF PARENTS AND CHILDREN NOT RELATING TO PROPERTY.

The father has the right, incident to his control of his children, to inflict reasonable chastisement or other punishment, or to impose reasonable restraints on them; and a mother, a guardian, a schoolmaster or other person *in loco parentis*, has the same right, either by an implied delegation of the father's authority, or from the fact of having the legal custody of a child (see 1 Hawk. P. C. 174; 1 Black. Com. 452; *Fitzgerald v. Northcote*, 1865, 4 F. & F. 656; *Cleary v. Booth*, [1893] 1 Q. B. 465; 57 & 58 Vict. c. 41, s. 24; and CHASTISEMENT). Sir William Blackstone states that a father may lawfully correct his child, being under age. It is, however, submitted that at the present time a right to chastise a grown-up child under the age of twenty-one could not be maintained (see *R. v. Jackson*, [1891] 1 Q. B. 671, which shows how the legal conception of marital authority at common law has altered).

By sec. 16 of the Industrial Schools Act, 1866 (29 & 30 Vict. c. 118), a child under the age of fourteen, whom his parent, step-parent, or guardian is unable to control, may on the application of the latter be sent to an industrial school.

A father has a right to the services of his children who reside with him, and on this ground he may maintain an action for the loss of such services, where a child has been enticed away from him or a daughter seduced, without proving that the child was in the habit of rendering any actual services to him (*Evans v. Walton*, 1867, L. R. 2 C. P. 615; *Terry v. Hutchinson*, 1868, L. R. 3 Q. B. 599). The action for seduction is maintainable, though the daughter be of full age (*Harper v. Luffkin*, 1827, 7 Barn. & Cress. 387). See also SEDUCTION.

The law gave a man's children or parents no right of action for negligence causing his death, though the deceased might have been the breadwinner of his family, in accordance with the maxim, *Actio personalis moritur cum personâ*. To remedy this state of things, the Act known as Lord Campbell's Act (9 & 10 Vict. c. 93) was passed in 1846. Under this Act (amended by 27 & 28 Vict. c. 95), an action may be brought for the benefit of the wife, husband, parent, and child of a person whose death has been caused by a wrongful act, neglect, or default, if the deceased could have maintained an action had death not ensued. "Parent" includes grandparents, step-father and stepmother, but not the mother of a bastard (*Wood v. Gray*, [1892] App. Cas. 576). "Child" includes grandchildren and stepchildren (s. 5); it does not include illegitimate children (*Dickinson v. North-Eastern Rwy. Co.*, 1863, 2 H. & C. 735). See CAMPBELL'S (LORD) ACT (ACCIDENTS).

The father has the right to control the marriage of his infant child, who is not a widower or widow, under the Marriage Acts, 4 Geo. IV. c. 76, ss. 8, 14, 16; 6 & 7 Will. IV. c. 85, s. 10. If the father be *non compos mentis*, a declaration of the Court that the proposed marriage is a proper one, obtained on petition, is equivalent to the consent of the father (4 Geo. IV. c. 76, s. 17).

After the death of the father the person to give consent is a guardian lawfully appointed; if there be no such guardian, the mother, if unmarried; and if there be no mother unmarried, a guardian of the person appointed by the Court. If the guardian or mother whose consent is necessary be *non compos mentis* or beyond the seas, or unreasonably refuse to give consent, a declaration of the Court as in the case of a father *non compos mentis* takes the place of such consent (*ibid.*).

A marriage which has been celebrated without the consent of a parent or guardian is not invalid (*R. v. Birmingham*, 1828, 8 Barn. & Cress. 29; 32 R. R. 332); but when the marriage of an infant has been obtained by a false oath or by fraud, without the consent required by the Act, the offending party may forfeit all the property which he has obtained by the marriage (see INFANTS).

The consent of the Court is required to the marriage of one of its wards, even though the father be living (Seton, *Decrees*, 5th ed., p. 775); and the Court will, if necessary, remove the ward out of the custody of a parent who seeks to bring about an improper marriage (*Roach v. Garvan*, 1748, 1 Ves. 158).

When there is no person in existence whose consent is required by the Acts, the marriage of an infant can take place without any consent.

The relationship between an illegitimate child and its parent is a natural, not a legal one, and a bastard can therefore marry without the consent of a parent (*Horner v. Horner*, 1748, 1 Hag. Con. 337; *Priestley v. Hughes*, 1809, 11 East, 1). A bastard may, however, be under the control of a guardian appointed by the Court, or may be a ward of Court, in which case the consent of the guardian or Court to his marriage is required.

Consent to a marriage must be honestly given, and any agreement under which a parent or guardian, whose consent is required, obtains a benefit in return for his consent to an infant's marriage, is void as against public policy (*Hamilton v. Mohun*, 1710, 2 Vern. 652).

It has been held that a father, being under a possible liability, under 43 Eliz. c. 2, to maintain the issue of his child's marriage in case of the parent's death or impotence, has a pecuniary interest which gives him a right to institute a suit to establish the nullity of the child's marriage (*Sherwood v. Ray*, 1837, 1 Moo. P. C. 353; *Bevan v. M'Mahon*, 1859, 2 Sw. & Tr. 58). In the last-cited case it was said that a mother could not institute such a suit during the life of her husband, as she was not then under any liability to maintain her grandchildren. As a married woman having separate property is under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75, s. 21), liable for the maintenance of her grandchildren, it would now probably be held that she could bring the suit either alone or jointly with her husband. A parent who petitions for a decree of nullity for his infant child's marriage must make it clear whether he is petitioning in his own right or as guardian on behalf of the infant (*Wills v. Cottam*, 1864, 3 Sw. & Tr. 364, 366).

A father has the right by 12 Car. II. c. 24, s. 8, to appoint guardians for his infant children (for guardianship, see INFANTS, vol. vii.).

Before the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), a mother had no right to appoint guardians for her children. Now, sec. 3, subsec. 1 of that Act enables her by deed or will to appoint guardians of her infant children to act after the death of both parents alone or jointly with the guardians appointed by the father. Subsec. 2 enables her to appoint guardians to act after her death jointly with her husband; and the Court, if satisfied after her death that the father is unfitted to be the sole guardian of his children, may confirm the appointment (see *In re G.*, [1892] 1 Ch. 292). A guardian appointed by the mother can (subs. 3) apply to the Court for its direction on any question affecting the welfare of the children.

Under neither of these Acts can a guardian be appointed for an illegitimate child (*Sleeman v. Wilson*, 1871, L. R. 13 Eq. 36; *Brand v. Shaw*, 1888, 16 Ct. of Sess. Ca. 4th Ser. 315, 320). The Court, however, exercising its paternal authority, has power to appoint a guardian for an illegitimate

child, and has sometimes in this way confirmed an appointment by a parent, or made a parent the legal guardian of the child (see Eversley, *Domestic Relations*, 2nd ed., p. 574).

The relationship of parent and child enables either to assist the other in his lawsuits without being liable for maintenance (1 Black. Com. 450; 4 Black. Com. 135). It also justifies a battery by either in defence of the other, provided that no more violence was used than was necessary for the defence of the relation (Hawk. bk. i. c. 60, s. 23; Archbold, *Crim. Law*, 21st ed., p. 760; 28 R. R. 437).

The implied relation of master and servant also enables a father to maintain an action for the loss of services in consequence of injuries caused to his child by assault or negligence; but when the child is too young to render services, no action will lie (*Jones v. Brown*, 1794, 1 Esp. 217; *Hall v. Hollander*, 1825, 4 Barn. & Cress. 660).

After the death of the father, the mother can bring an action which depends on the loss of a child's services (*Andrews v. Askey*, 1837, 8 Car. & P. 7). When a daughter is living with her mother during the life of the father, there can be no doubt that the mother can maintain an action for seduction, even though the custody of the daughter have not been given to her by an order of the Court. For the fact that the daughter is *de facto* a member of the mother's household is enough to support the inference that the relation of master and servant exists, though the father might have a paramount claim (see *Thomson v. Ross*, 1856, per Bramwell, B., 5 H. & N. 16, 18; Pollock on *Torts*, 5th ed., pp. 221, 222).

A parent has not the liability for torts committed by his infant child which a husband has for the torts committed by his wife. At common law an infant, unlike a married woman, is capable of being sued alone (see INFANTS). A father is, of course liable for the acts of his child which he has authorised; and if the child be in his employment, he is liable, as master, where he would be responsible for the act of any other servant. Beyond this his responsibility does not extend (see per Willes, J., *Moon v. Towers*, 1860, 8 C. B. N. S. 611, 616; Eversley, *Domestic Relations*, 2nd ed., p. 564).

VIII. RIGHTS OF PARENTS AND CHILDREN IN RELATION TO PROPERTY.

With the exception of a somewhat uncertain right to receive the earnings of a child living under his control, a parent has no right to derive benefit from the property of his child. Sir Wm. Blackstone says that a father may "have the benefit of his children's labour while they live with him and are maintained by him" (1 Black. Com. 453). Yet there is no authority for saying that a parent can sue for wages due to his child; the right of the latter to sue for them is beyond doubt. The County Courts Act, 1888 (51 & 52 Vict. c. 43, s. 96), enables an infant to sue without a next friend, for a sum not exceeding £50, for wages, or piece work, or work as a servant. Blackstone's proposition is probably true to this extent: that if a young child be living with and maintained by a parent, payment of its earnings to the parent is good in law; and also that if a child do work for a parent who maintains it, a contract by the parent to pay wages cannot be implied (Eversley, *Domestic Relations*, 2nd ed., p. 531).

The natural guardianship of a parent gives him no right to receive any personal property which comes to his child. Thus an executor who pays a legacy due to an infant to the latter's parent, does so at his peril, unless such payment be authorised by the will or directed by an order of Court (*Cooper v. Thornton*, 1790, 3 Bro. C. C. 96, 186; *Robinson v. Tickell*,

1803, 8 Ves. 142; Wms. *Executors*, 9th ed., vol. ii. p. 1261). The executor is also not justified in paying a legacy direct to an infant (*ibid.*); but he may discharge himself from responsibility by paying it into Court under the provisions of 36 Geo. III. c. 52, s. 32).

Of course, when a parent has obtained control of any property belonging to his child, he is in the position of a trustee, and must account for the income.

Sir William Blackstone, following Coke, lays down the rule that if an estate be left to an infant, the father is by common law the guardian, and must account to the child for the profits (*Co. Lit.* 88 b; 1 Black. *Com.* 461). There are a number of cases in which it has been held that when a father, or other person whose duty it is to protect an infant's rights, enters into possession of the infant's land, he is considered to have possession as bailiff not only during the infancy, but also afterwards, unless he can show that the circumstances under which he holds have changed his possession from one of a fiduciary character. Therefore, however long his possession may have continued, he must, in general, account for the profits received by him, and can gain no prescriptive title to the land (*Thomas v. Thomas*, 1855, 2 Kay & J. 79; *Quinton v. Frith*, 1868, Ir. R. 2 Eq. 396; *Wall v. Stanwick*, 1887, 34 Ch. D. 763; *In re Hobbs*, 1887, 36 Ch. D. 553; *Tinker v. Rodwell*, 1893, 9 T. L. R. 657).

In strictness, however, a father, as natural guardian, has no legal right to control real property devised to his child (*R. v. Sherrington*, 1832, 3 Barn. & Adol. 714; Simpson, *Infants*, 2nd ed., p. 179). As guardian in socage, he may be entitled to the management of the real property which a child under the age of fourteen has acquired by descent, but this guardianship is practically obsolete. The proper course for a father, when an infant has become in any way possessed of property not under the control of trustees, is to procure his appointment by the Court as guardian of the estate. (For the powers of a guardian, see Eversley, *Domestic Relations*, 2nd ed., pt. iii. c. 6; INFANTS, vol. vii.).

A mother who is in possession of her child's real estate is, like a father, in a fiduciary position, and must account for all the profits which she has received (*Wall v. Stanwick*, 1887, 34 Ch. D. 763).

A gift of property by a child under the age of twenty-one to a parent, like a gift by a minor to a stranger, may be avoided by the child within a reasonable time after obtaining his majority (Eversley, *Domestic Relations*, 2nd ed., p. 535; see also INFANTS). A child of full age can make as valid a gift to a parent as to a stranger. The Courts of equity, however, looked with suspicion upon a pecuniary transaction between a parent or person *in loco parentis* and a child who had recently attained his majority, or was not entirely emancipated from parental control, and set aside the transaction if tainted by undue parental influence. With regard to such transactions, they laid down the following rule: the presumption, where no benefit, or an inadequate benefit, has been received by the child, is that undue influence was used, and it is the duty of the party who endeavours to maintain the transaction to rebut the presumption, and to show that the child was in a position to form a free and unfettered judgment. The child must apparently have had independent advice, as well as have acted with full knowledge of the transaction (*Archer v. Hudson*, 1844, 7 Beav. 551; *Savery v. King*, 1856, 5 H. L. C. 627; *Davies v. Davies*, 1863, 4 Gif. 417; *Bainbrigge v. Browne*, 1881, 18 Ch. D. 188). The right to set aside the transaction will, however, be lost by acquiescence (*Wright v. Vanderplank*, 1856, 8 De G., M. & G. 133; *Turner v. Collins*, 1871, L. R. 7 Ch. 329).

A reasonable transaction between a parent and a child who has just attained his majority, from which the latter derives some benefit, will be upheld, though it be also beneficial to the parent (*Baker v. Bradley*, 1854, 2 Sm. & G. 531; *Bosville v. Middleton*, 1857, 29 L. T. O. S. 341); and the Court will not interfere with a transaction in which no undue influence can reasonably be inferred, though the child gets no benefit (*Firmin v. Pulham*, 1848, 2 De. G & Sm. 99; *Thorner v. Sheard*, 1850, 12 Beav. 589); as where a daughter, six months after attaining her majority, voluntarily agreed to pay a debt for her father, who was in difficulties (*Thorner v. Sheard*, 1850, 12 Beav. 589).

A transaction between a parent and child will not be set aside, on the ground of parental influence, against a third person, who has acquired his right without notice of the circumstances from which undue influence will be presumed (*Thorner v. Sheard*, *supra*); but it will be set aside against every volunteer who claims under the parent, and against every person who has taken with notice of the encumbrances (*Bainbrigg v. Browne*, 1881, 18 Ch. D. 188).

An arrangement between a parent and child, such as a resettlement of the family estates, having for its object the benefit of the other members of the family, is regarded with favour. The exercise of parental control is inseparable from such an arrangement, and will not invalidate it, provided that it was reasonable (*Hartopp v. Hartopp*, 1856, 21 Beav. 259). It is not necessary that the child should have had independent advice, and the Court will not inquire whether the influence of the parent was used with more or less force (*Jenner v. Jenner*, 1860, 2 De G., F. & J. 359; *Hoblyn v. Hoblyn*, 1889, 41 Ch. D. 200).

A resettlement by which the parent obtains exclusive advantages, to the prejudice of the child and his family, will not be upheld unless it be proved that the child fully appreciated the effect of the arrangement (*Houghton v. Houghton*, 1852, 21 L. J. Ch. 482); but the fact that the parent obtains some benefit under it does not necessarily make the transaction unfair. Even if an unfair benefit be given to the parent, the whole arrangement is not necessarily vitiated, and the objectionable provisions may be expunged (*Jenner v. Jenner* and *Hoblyn v. Hoblyn*, *supra*).

An arrangement between a parent and child for the purpose of compromising a family dispute is on a similar footing to an arrangement for the benefit of other members of the family. When no special advantage is gained by the parent, the fact that the child has recently come of age and had no independent advice does not give rise to a presumption of undue influence (*Bosville v. Middleton*, 1857, 29 L. T. O. S. 341).

A gift from a parent to a child is not regarded with suspicion; and, in accordance with the equitable doctrine of advancement, an intention to make a gift to a child will be inferred in certain cases where no such inference would be drawn in favour of a stranger. The doctrine of advancement is, shortly, as follows:—

When a purchaser takes a conveyance or transfer in the name of another, there is generally, according to a rule of equity, a presumption of a resulting trust in favour of the purchaser. But the circumstance that the purchaser is the father of the nominee operates to rebut the resulting trust which would otherwise be implied, on the ground that there arises a counter presumption of an intention on the part of the purchaser to make provision for the child. The presumption arises also when the purchaser has placed himself *in loco parentis* to the nominee. It does not arise *ipso facto* when the purchaser is the mother of the nominee, but very little evidence beyond

the relationship of mother and child would suffice to prove the intention on her part to make a gift. See **ADVANCEMENT**.

Provision is often made for children by means of portions. Sometimes, in settlements of personal property, parents have the right to appoint a particular fund among their children; and sometimes, in settlements of real estate, the younger children are provided for by portions secured by a term of years. A portion may be satisfied by a subsequent legacy. See **PORTIONS**.

For the ademption of a legacy to a child by a subsequent gift, see **ADEMPMENT**.

A parent has no insurable interest in the life of his children on the ground of relationship. The only interest in respect of which 14 Geo. III. c. 48, s. 1, allows a parent to insure his child's life is a pecuniary interest (*Halford v. Kymer*, 1830, 10 Barn. & Cress. 724; *Worthington v. Curtis*, 1875, 1 Ch. D. 419). Under the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25, s. 62), however, a parent may insure the life of a child for an amount limited to £6 in the case of a child under five years of age, and £10 in the case of a child under ten. If a parent have received the amount of an insurance effected by him for his own benefit on the life of his child, although he had no pecuniary interest, he is entitled to retain the money against the estate of the child (*Worthington v. Curtis*, *supra*).

There is no reason why a parent should not insure his child's life for the benefit of the child, provided that it appears in the policy, in compliance with 14 Geo. III. c. 48, s. 2, that the insurance is for the benefit of the child (*Collett v. Robinson*, 1851, 9 Hare, 162).

A child has in general no greater insurable interest in the life of a parent than a parent in the life of a child (*Shilling v. Accidental Death Insurance Co.*, 1858, 1 F. & F. 116; *Howard v. Refuge Friendly Society*, 1886, 54 L. T. 644); but according to the decisions in the United States, a child who is actually supported by a parent has an insurable interest in the parent's life (see *Lord v. Dall*, 1815, 12 Mass. 118, 3rd ed.; *May, Insurance*, 3rd ed., vol. i. ss. 102A, 103).

By sec. 11 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), a policy of insurance on a man's own life, expressed to be for the benefit of his children, creates a trust in their favour, and the sum payable under the policy will not, as long as any object of the trust remains unperformed, form part of the father's estate.

The law of England, unlike that of some other countries, allows all persons of sound mind who are of full age to dispose by will of all their property to the exclusion of their own families. In cases of intestacy, however, the nearest relations are entitled to the personal property of the deceased, after payment of debts, in the proportion and order prescribed by the Statutes of Distribution. For the rights of parents and children under these statutes, see **DISTRIBUTION**, **STATUTES OF**. For the right of inheritance in relation to the real property of intestate parents and children, see **INHERITANCE**; **REAL PROPERTY**, **DESCENT OF**.

A bastard being *nullius filius*, no rights of inheritance or of succession *ab intestato* to personal property exist between a bastard and his parents, for his only legal relations are his legitimate descendants (1 Black. Com. 459). An exception to this rule was created by sec. 8 of the Provident Nominations and Small Intestacies Act (46 & 47 Vict. c. 47), which provides that when a member of a friendly society who is illegitimate dies intestate, the directors may divide any sum over which he had an unexercised right of nomination under the Act among the persons who would have been entitled if he had been legitimate. This provision is

repealed, and, as to registered societies, re-enacted by the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25, ss. 58 (2), 107).

[*Authorities.*—See bibliography to INFANTS.]

Paris, Coutume de.—See FRENCH LAW.

Parish.

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Various Kinds of Parishes.—There are at least four different kinds of parishes still in England:—

(1) The “civil” parish, the unit of local government.

(2) The “ecclesiastical” parish, the unit of church government.

(3) The “land-tax” parish, which is of importance only for revenue purposes. It is defined in sec. 5 of the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), as any town, ward, township, tithing, parish, place, or precinct for which a separate assessment of income tax duties or land tax may be made, or for which any assessor or collector may be lawfully appointed for the purpose of assessing or collecting such duties or land tax.

(4) The “highway” parish, which was defined in the Report of the Committee of the House of Lords on Highways (p. vi.) as “any parish, township, or place maintaining its own highways, or which would maintain its own highways, if it were not included in a highway district or an urban sanitary district.” Many townships, hamlets, and tithings which were not separate poor-law parishes, were by custom separate highway parishes. The Local Government Act, 1894 (56 & 57 Vict. c. 73, s. 25 (1)), has, however, practically put an end to the highway parish as a separate area. Highway parishes only exist now in some thirty-four districts, in which the existence of a Highway Board has been artificially prolonged by an order of the Local Government Board. In another twelvemonth apparently all Highway Boards and highway parishes will have ceased to exist (see HIGHWAYS, vol. vi. pp. 181, 182).

It is unnecessary to make any further reference to the “land-tax” or to the “highway” parish; but more must be said as to the “civil” and the “ecclesiastical” parish.

I. THE CIVIL PARISH.

The Ancient Parish.—Originally the civil parish and the ecclesiastical parish were identical. The common law knew of no distinction between them. The ancient parish was nothing else in most parts of England than the old Saxon *tun* or township, to which the word “parish” was applied whenever it was regarded apart from and outside the feudal system. The parish priest rose to be “the person” of the parish, and presided as such over the parish meeting held in his church. If a township had no church and no priest, it joined itself to another township which had both, and the two became one parish. “If a place has not a church, churchwardens, and

sacramentalia, it is not properly a parish" (Comyn's *Digest*, "Parish," B. 2, vol. v. p. 180). At the annual parish meeting, parish officers, such as the churchwardens and their assessors, the receivers, the parish clerk, the sexton, etc., were elected, whose duties were both civil and ecclesiastical; the business at the parish meeting never was confined to church matters. The parish owned much property, real and personal,—houses, fields, flocks, books, vestments, tapestry, and jewels. The receivers collected the rents, fines, fees, and other income of the parish; this fund the churchwardens administered, and presented annually to the parish meeting accounts of its expenditure. The balance-sheet was read in the nave of the church. Parish accounts thus rendered by churchwardens so long ago as A.D. 1349 are still in existence. Thus, by the end of the fourteenth century, England was completely covered with parishes, each of which was in itself an organised democratic community, managing its own affairs, and many of which dated back without interruption to the tenth or the eleventh century. When parishioners were compelled to repair highways and bridges, when the poor law sprang into existence, and waywardens and overseers of the poor had to be appointed, the civil importance of the parish became still more marked, but the area of the parish remained unchanged. And the parishioners came to acquire rights as such; their boundaries were recognised and defined, and the men who lived within those boundaries had exclusive privileges which the law would not acknowledge in a vague fluctuating body, such as the copyholders of a manor or the public generally. Thus the inhabitants of a parish may acquire by prescription the right to enter on the close of another, and draw water, or play all manner of lawful games thereon (*Fitch v. Rawling*, 1795, 2 Black. H. 393; *Race v. Ward*, 1855, 4 El. & Bl. 702; 24 L. J. Q. B. 153; *Mounsey v. Ismay*, 1863, 1 H. & C. 729; 32 L. J. Ex. 94; *Hall v. Nottingham*, 1875, 1 Ex. D. 1). But a custom for the inhabitants of several parishes adjoining or contiguous to parish A. to exercise the right of recreation over land situate within parish A. is bad (*Edwards v. Jenkins*, [1896] 1 Ch. 308).

Severance of the Civil from the Ecclesiastical Parish.—Even at the beginning of this century the civil and the ecclesiastical parish were in nearly every case identical; their boundaries still coincided. There were then 10,152 parishes in England and Wales, varying greatly both in size and population; and there were a certain number of "extra-parochial places," such, for instance, as the four Inns of Court. An ancient parish might be situated partly in one county and partly in another, or partly in a borough and partly in a county. Some of the larger parishes were subdivided for ecclesiastical purposes or for highway purposes into townships, chapelries, or hamlets. No less than 1300 of these ancient parishes had outlying portions wholly detached and scattered about over adjoining parishes. As the population increased and shifted, it became urgently necessary to rearrange the boundaries of these parishes. But the Legislature, as usual, would not let its right hand know what its left hand was doing. Conflicting attempts were made to accomplish the same object. One set of Acts readjusted the boundaries of parishes for civil purposes; two entirely separate sets of Acts (not to mention numerous local Acts) dealt with the same problem for ecclesiastical purposes. There were the DIVIDED PARISHES ACTS (*q.v.*), the Church Building Acts (see ECCLESIASTICAL COMMISSIONERS), and the New Parishes Acts (6 & 7 Vict. c. 37; 19 & 20 Vict. c. 104). And now by the Local Government Act, 1894, all portions of a parish which lie in different counties or in different districts are for civil purposes created separate parishes. Small parishes, too, have been united;

the number of civil parishes has in fact slightly diminished since the last census in 1891. Parish boundaries, too, have been largely rectified; no fewer than 3258 parishes had their boundaries altered between 1881 and 1891. Many large parishes also have been divided; and all detached portions of one parish which were wholly surrounded by another have merged in the latter parish.

For ecclesiastical purposes, the ancient parishes underwent a similar, but wholly independent, process. It appears from the Appendix to the Forty-ninth Report of the Ecclesiastical Commissioners for England, p. 55, that during the period from 1818 to 1st November 1896 no fewer than 3629 new districts and parishes were formed in England and Wales under the Church Buildings Acts, the New Parishes Acts, and certain local Acts. And in arranging these ecclesiastical divisions, little or no regard was paid to the changes which were, almost simultaneously, being made in the same localities for purposes of local government.

What was the result? In 1871 there were some 15,000 civil parishes in England and Wales, and of these not more than 10,000 were the same in area as the corresponding ecclesiastical divisions. In 1891 the boundaries of only 5642 civil parishes coincided with ecclesiastical parishes of the same name. There are now 14,896 civil parishes in England and Wales, including 43 metropolitan parishes; there are 13,822 ecclesiastical parishes; in two-thirds of these their respective areas are widely divergent. A farmer has often to pay his tithe to the rector of one parish, his rates to the collector of another. The ancient parish of Hampstead still remains one parish for civil purposes, though its population has increased to 68,425; but it contains 15 ecclesiastical parishes. Civil parishes still present the greatest inequalities in area and population. Many parishes have an area of less than 50 acres; many have an area exceeding 10,000 acres. The average population of a parish is about 1900; yet there were in 1891 eleven parishes without any inhabitant; half the parishes in Northumberland then had less than 100 inhabitants; 6367, or 43 per cent. of the whole number of parishes, had a population under 300; 7813, between 300 and 10,000; and 504, or 3·4 per cent., had a population over 10,000. Islington was the most populous parish, and that had 319,143 inhabitants.

The Modern Civil Parish.—The civil parish is now for all practical purposes identical in area with the poor-law parish. It is, indeed, defined by sec. 18 of the Poor Law Amendment Act, 1866 (29 & 30 Vict. c. 113), as “a place for which a separate poor rate is or can be made, or for which a separate overseer is or can be appointed.” But it takes a prominent place in many matters outside the poor law. From 1834 to 1894 the parish was no doubt somewhat disregarded as an administrative unit. Unions were created to administer the poor law; the county police superseded the parish constables (see CONSTABLE, vol. iii. p. 301); the sanitary functions of urban vestries were transferred to local boards of health. But all rates included in the poor rate were still collected locally, and all lists of voters for any election were still made out in parishes. Many important powers were still vested in “the ratepayers of the parish in vestry assembled,” such as the management of the parochial charities and the adoption of certain permissive Acts. But the Local Government Act, 1894, has largely increased the scope and importance of every parochial organisation, and has made the parish once more the unit of local government. It has also created a sharp distinction between urban and rural parishes, which we must proceed to examine.

Urban Parishes.—Any parish which on 5th March 1894 lay wholly in an

urban sanitary district is now an "urban parish." If on that day any parish lay partly within, and partly without, a rural sanitary district, each part became a separate parish, and the urban part is now an urban parish (L. G. Act, 1894, s. 1 (3)). If on 5th March 1894 any parish was situate in more than one urban district, the parts of the parish in each such district, unless the County Council for special reasons otherwise directed, became separate parishes (L. G. Act, 1894, s. 36, subs. (2)). Each of these provisions is, of course, subject to any alteration of area made by or in pursuance of this or any other Act. In urban parishes the vestry still has civil powers; it still nominates, though it does not appoint, the overseers; in some urban parishes a select vestry still meets (see VESTRY). There are now 1803 urban parishes in England and Wales, of which 43 are metropolitan parishes.

Rural Parishes.—Every parish which was in a rural sanitary district on 5th March 1894 is now a "rural parish." If on 5th March 1894 any parish was partly within, and partly without, a rural sanitary district, each portion became a separate parish; and the portion within such district is now a rural parish. Every rural parish with a population of 300 and upwards has a parish council. A rural parish with a smaller population may have a parish council if it will; but as a rule the local authority in such a parish is the parish meeting (L. G. Act, 1894, s. 1). The vestry for all practical purposes of local civil government is now wholly superseded in every rural parish. (See PARISH COUNCIL and PARISH MEETING.) There are now 13,093 rural parishes in England and Wales, of which 7310 have a parish council.

II. THE ECCLESIASTICAL PARISH.

Historical Origin of the Ecclesiastical Parish.—Originally the word *parochia* signified diocese; and the property of the church was held by the bishop, and the district churches or chapels were served by itinerant priests. It is possible that parochial churches may have been developed by some modification of the principle and adaptation of the principle on which districts were assigned to the old baptismal churches (*i.e.* churches with public baptisteries—as to which see Lord Selborne's *Ancient Facts and Fictions concerning Churches and Tithes*, 57–60, 121). In any case, at least before the end of the twelfth century, parishes with churches and incumbents instituted by the bishops generally endowed with tithes were a constituent part of the ecclesiastical organisation of the country; and the word "parish" thus came to denote the area committed to the charge of one priest, who had the care of souls therein and to whom the ecclesiastical dues and generally the tithes thereof were paid. Originally the vill or township, and not the parish, was regarded as the unit for civil administration by the common law. (For some possible exceptions, see Stubbs, *Select Charters*, pp. 160, 284; but the earliest of these was connected with religion, the law noticing parishes only with regard to tithes and ecclesiastical matters). Subsequently the parish came to be recognised by statute law as a unit for the purposes of local government and local taxation. Many writers indeed maintain that the parish is simply the vill or township of the Anglo-Saxon period, regarded in its ecclesiastical aspect. In the south of England, at all events, the parish of the nineteenth century is practically identical with the vill or township of the thirteenth. As many townships were too poor to support separate priests, one parish often contained several townships; but it is exceptional and probably a modern innovation for one parish to be contained in two townships (see, however, *R. v. Watson*, 1868,

L. R. 3 Q. B. 762). So closely was religion identified with works of social improvement and charity in the Middle Ages, that the parish with its democratic vestry was the centre of local life in the Middle Ages. Hence, when in the later Tudor period the State turned the relief of the poor from a religious into a civil obligation (see articles OVERSEERS; POOR LAW), it selected the parish as the unit for poor-law purposes. This course was followed in subsequent legislation, until the parish became the unit for local government and taxation. When, as in the southern counties, the parish and vill were identical, this made in all respects a good working arrangement. In the northern counties, however, when parishes embraced a number of vills, it was found that the full benefit of the poor law was not reaped, and accordingly in such cases the township was still recognised as a unit for which overseers might be appointed. Subsequently it was found necessary, owing to the increase in population and the consequent need for increased church accommodation, to form new ecclesiastical districts separate ecclesiastically from the old civil parish.

Modern Divisions of Parishes for Ecclesiastical Purposes.—At common law no means existed of dividing a parish, and prior to the Act 58 Geo. III. c. 45, such division could only be effected by local or private Acts of Parliament.

Parishes can now, however, be divided for ecclesiastical purposes under the Church Building Acts and the Acts for making new parishes. These Acts in no way affect the old parish for any civil purpose. They fall into three groups.

(1) *The Church Building Acts.*—These are set out fully in article ECCLESIASTICAL COMMISSIONERS, vol. iv. at p. 379; see also Phillimore, *Eccl. Law*, vol. i. pp. 1720 *et seq.*

(2) *The Acts enabling Private Persons to build Churches or Chapels:*—5 Geo. IV. c. 103; 1 & 2 Will. IV. c. 108; Private Patronage Act, amended by 1 & 2 Vict. c. 107, 1837; 3 & 4 Vict. c. 60, 1840; 7 & 8 Vict. c. 56, 1844; 11 & 12 Vict. c. 37, 1848; 14 & 15 Vict. c. 97, 1851.

(3) *The Acts for making new Parishes by the agency of the Ecclesiastical Commissioners*, viz.:—The New Parishes Acts, 6 & 7 Vict. c. 37, 1843; 7 & 8 Vict. c. 94, 1844 (commonly known as the Peel Act); 19 & 20 Vict. c. 104, s. 3, 1856 (commonly known as the Blandford Act). This last Act, with the Acts 19 & 20 Vict. c. 55, 1857; 32 & 33 Vict. c. 94, 1869; and 47 & 48 Vict. c. 565, 1884, to some extent united these classes of Acts.

Chapelries, etc.—The only districts constituted under the first group of these Acts are district chapelries and consolidated chapelries; under the second, particular districts; under the third, the constitution of spiritual districts for ecclesiastical purposes and “new parishes.”

District chapelries were first constituted under 59 Geo. III. c. 134, s. 16. (As to the mode of formation, see article ECCLESIASTICAL COMMISSIONERS, vol. iv. p. 382.) The incumbent is to be a perpetual curate, with a right of succession. District chapelries are formed out of one cure.

A district chapelry may be constituted from former district chapelries, including an ancient parochial chapelry (*Tuckness v. Alexander*, 1863, 9 Jur. N. S. 1026). Consolidated chapelries differ from district chapelries in that they are formed out of more than one cure. An existing church may be adopted as the chapel or a new one built. Unless the church is either a vicarage or a rectory, the consolidated chapelry will be a perpetual curacy. See PERPETUAL CURATE.

“Particular districts,” “separate districts for ecclesiastical purposes,” and “new parishes” are treated under the article ECCLESIASTICAL COM-

MISSIONERS, vol. iv. pp. 283, 284. As to the election of churchwardens, see article CHURCHWARDEN, vol. iii. p. 16.

(As to boundaries of new parishes, see *supra*, PARISH BOUNDARIES.)

[*Authorities*.—Stubbs, *Select Charters*; *Constl. History*, vol. i.; Pollock and Maitland, *Hist. Eng. Law*; Shaw, *Parish Law*, 8th ed.; Steir, *Parish Law*; Burn, *Eccl. Law*; Phillimore, *Eccl. Law*, 2nd ed.]

Parish Apprentice.—See APPRENTICE, vol. i. at p. 292.

Parish Boundaries.—The boundaries of a parish, at common law, depend upon ancient and immemorial custom, and must therefore be determined by the temporal and not by the ecclesiastical Courts. The means by which their memory was retained was by perambulations or beating the bounds.

The perambulations took place at Rogationtide, and consisted in the parishioners, or the leading men of the parish, headed by the incumbent, going over the parish, so as to mark the bounds. It was usual to sing the Litany and the 103rd and 104th Psalms on these occasions, and the parishioners were bound to provide banners for the occasion. Injunction 18 of the Injunctions of Elizabeth, while generally forbidding processions, directs that the people, “for the containing of the perambulation of the circuit of the parishes, shall once in the year, at the time accustomed, with the curate and the substantial men of the parish, walk about their parishes as they were accustomed, and at their return to church make their common prayer.” See also Injunction 19. The course followed in a perambulation, apart from other evidence, will determine the boundary (*McCannon v. Sinclair*, 1859, 28 L. J. M. C. 247). These perambulations still take place in many parishes.

Proper expenses incurred in a perambulation are payable out of the poor rate, if the perambulation does not take place more than once in three years (7 & 8 Vict. c. 101, s. 60), but no refreshment can be claimed by custom by the parishioners in making it (*Welby v. Herbert*, 1675, 27 & 28 Car. II., 2 Lev. 163).

In making the perambulation, parishioners may enter a private house only if it is on the boundary line (*Taylor v. Davy*, 1839, 7 Ad. & E. 412).

If a parish is bounded by a river or a highway, the presumption is that half the soil or half the river is presumed to belong to the parish to which it is adjacent; but in the case of a tidal river, if there is nothing to show whether or not it extends beyond the boundary of low or high water mark, the land lying between must not be presumed to lie within the parish. (As to parishes bounded by sea, it may be stated that *primâ facie* the shore is extra-parochial. See further *R. v. Musson*, 1858, 27 L. J. M. C. 100, and see article on FORESHORE.)

Under the Inclosure Acts (41 Geo. III. c. 109, and 8 & 9 Vict. c. 118, s. 39), the Board of Agriculture may fix and declare the boundaries of a parish. Such boundaries are to be published by leaving a description with one of the overseers. See also 3 & 4 Vict. c. 31; 8 & 9 Vict. c. 118; 12 & 13 Vict. c. 83, and 15 & 16 Vict. c. 79. Similar powers are given under the Tithe Acts (1 & 2 Vict. c. 69, s. 2; and see 2 & 3 Vict. c. 62, s. 4).

Under the Local Government Act, 1888, s. 57, the County Council may define the boundary of a parish (see subss. 2 and 3).

Such order must be confirmed by the Local Government Board, and laid

upon the tables of Parliament. If one-sixth of the county electors object to the order, the Local Government Board shall order a local inquiry.

The boundaries of district parishes, under the Church Building Acts, are to be marked out, and such boundaries may be altered by Order in Council (58 Geo. III. c. 45, s. 22; 3 & 4 Vict. c. 60, s. 7). The boundaries of district chapelries may also be altered by the Commissioners, with the consent of the bishop, patron, and incumbent (11 & 12 Vict. c. 37, s. 3).

The New Parishes Acts (6 & 7 Vict. c. 37, s. 10; 7 & 8 Vict. c. 96) require the registration of the map required under the Acts in the diocesan register. It is no longer necessary to register them in Chancery (36 & 37 Vict. c. 9). The boundaries of new parishes may be altered from time to time.

[*Authorities*.—Shaw, *Parish Law*, 8th ed.; Caldwell, *Ecclesiastical Documents*; Phillimore, *Eccl. Law*, 2nd ed.]

Parish Church.—A church is a place dedicated and consecrated to the service of God, and is common to all the inhabitants (*Corven's case*, 1611, 12 Rep. 342; see also *Fitzwalter's case*, 1493; Year Book, 8 Hen. VII. case No. 4, fol. 12).

The ancient manner of founding a church was for the intending founder first to make application to the bishop and obtain his licence; after which the bishop or his commissioners set up a cross, and set forth the ground where the church was to be built. After this, the founder might proceed to the building of it. When the church was finished, it was necessary for the bishop to consecrate it, as until consecration the sacraments could not be administered in it. But the bishop would not consecrate it until it had been endowed.

Accordingly no church or chapel is recognised as such by the law until it has been consecrated. The legal act of consecration is effected by the decree of a competent ecclesiastical Court, that is to say, the act or sentence of consecration, signed by the bishop, setting aside the ground or building *in sacros usus*. The prayers accompanying the ceremony of consecration are not in English law material to the act (*Wood v. Burial Board of Headingley-cum-Burley*, [1892] 1 Q. B. 713). There is no legal form of service prescribed for the consecration of churches. The form in common use was drawn up by Convocation in 1712, but never received the royal assent. As to the form, further see Phillimore, *Eccl. Law*, vol. ii. pp. 1391–1398.

Whether a church could or can be lawfully built without the bishop's sanction, at common law, may be doubtful; but the bishop unquestionably has the power, after a church has been built, to withhold or refuse consecration.

A consecrated church, by the common law, can never be used as a habitation for man, nor can it be let at a rent or pulled down (*Wright v. Ingle*, 1885, 16 Q. B. D. 379; *R. v. Twiss*, 1869, L. R. 4 Q. B. 407).

Power to pull down churches was originally given by private Acts. Provision is also made for it under Open Spaces Acts, 1887 and 1890 (50 & 51 Vict. c. 32; 53 & 54 Vict. c. 15). A church cannot be reconsecrated except it be utterly burnt down or destroyed. In the case of bloodshed in a church, the one exception in which the canon law admits reconsecration, the custom of the English Church has been, and is, to hold a reconciliation service. A reconciliation service is also held when a church which has been long disused is restored to sacred purposes (but see *Gibs. Cod.* 190).

Some doubt, however, exists whether, if the altar is removed, a reconsecration is not necessary to re-establish ecclesiastical jurisdiction. In *Parker v. Leach*, 1866, L. R. 1 P. C. 312, the Privy Council held that if a church is substantially rebuilt on the old foundations, there is no need for a reconsecration (see also *Bottiscomb v. Ear*, 1852, 9 Jur. N. S. 210).

The Act 30 & 31 Vict. c. 133, passed to allay doubt, provides that although the walls of a church are partly demolished, and the "communion table" is removed, a reconsecration or reconciliation is not necessary to the due administration of divine offices, and legalises all marriages there performed.

Under the Act 5 Edw. VI. c. 1, s. 2, a general duty to attend church is still imposed upon "all and every person inhabiting the realm to resort to their parish church or chapel accustomed, or, upon reasonable lett therefor, to some usual place where common prayer and such service of God shall be used, etc." This Act is still, in theory, binding upon members of the Church of England; and therefore no churchwarden has the right to prevent an inhabitant of a parish or district, or apparently a stranger, from entering church to attend divine service, although he considers that he cannot be conveniently accommodated (*Taylor v. Timson*, 1883, 20 Q. B. D. 671).

A parish church has the parochial rights of christening and burial. Its incumbent is a rector or vicar (see articles RECTOR; VICAR; LAY IMPROPRIATOR), and it is distinguished from a parochial chapelry, or a chapel of ease, and a private chapel.

The freehold of the church is in the rector or vicar. The freehold of the chancel is in the rector (on this subject, further see articles CHANCEL; ECCLESIASTICAL CORPORATIONS; ECCLESIASTICAL COMMISSIONERS; PERPETUAL CURATE). As the freehold of the church is in the incumbent, he has the custody of the key and control of the bells (for cases on this, see article CHURCHWARDEN).

Churches are exempt from poor rate under 3 & 4 Will. IV. c. 30, and from assessment on land or buildings under the Metropolis Management Acts (*Angell v. Vestry of Paddington*, 1868, L. R. 3 Q. B. 714), from new street expenses (38 & 39 Vict. c. 55, s. 151), and from expenses of private street works (55 & 56 Vict. c. 57).

Under the Riot Damages Act, 1886 (49 & 50 Vict. c. 38), payment to the churchwardens or chapelwarden, if any, or the persons having the management of such church or chapel, or the persons in whom the legal estate in the same is vested (who, for the purposes of the Act, are to be deemed the persons who have sustained loss in respect of any injury, theft, or destruction of property with regard to a church or chapel), shall exonerate the police authority, without prejudice to the right of any person to recover from the payee. As to repairs of church, see articles PARISHIONER; CHURCHWARDEN; RECTOR. As to ornaments of church, see articles CHURCHWARDEN; FACULTY. See also articles AISLE; CHANCEL; NAVE; TRANSEPT. As to the law relating to churchyard, see CHURCHYARD.

Free Chapels.—A free chapel is a chapel free from the jurisdiction of the ordinary. It is agreed that the king may erect a free chapel, and he may, it is said, license a subject to do so, and by charter exempt it from the ordinary's jurisdiction; but no instance of this can be produced. Probably most free chapels were originally built on demesne lands belonging to the Crown, which afterwards passed into the hands of laymen. Where this was not the case, a lost grant must be presumed. The king himself is the visitor of free chapels, and the office is exercised by the Lord Chancellor.

By 26 Hen. VIII. c. 3, s. 1, and 1 Eliz. c. 4, s. 1, free chapels are charged

with first fruits, but this may only apply to free chapels in the hands of subjects.

An institution by the ordinary will not suffice to subject a free chapel to the jurisdiction of the ordinary.

All free chapels were surrendered to the king in the first year of Edward VI., with the charters attached to them, except a few exempted by statute, and some have also been subsequently founded.

Parish Clerk.—The office of parish clerk was originally held by clerks in holy orders. Originally every minister of a church had at least one such clerk, whose duty it was to assist him in the church at the performance of divine service, especially at the holy communion, and to follow him in processions down the nave with the holy water, and to accompany him when he visited the sick. A constitution of Archbishop Boniface (1261 A.D.) provided that the profits of the office of *aquæ bajulus* (bearer of holy water) should be conferred on poor clerks, whence *aquæ bajulus* became a name for an incumbent's clerk. By the same constitution it was provided that the rectors and vicars, whom it more particularly concerned to know who was fit, should make the choice.

Canon 91 of the Canons of 1603, which canon was adopted for the Province of York in 1606, provides that no parish clerk shall be chosen in the city of London or elsewhere within the province of Canterbury, but by the parson, vicar, or other minister of the place for the time being. In certain places, however, a custom may exist for the parishioners in vestry or for the churchwardens to appoint the clerk, and when this is so the custom will oust the canon (*Cundit v. Plomer*, 1611, 8 Jac. I. 2 Hughes, *Abr.* "Prohibition," 1551; *Jermyns' case*, 1624, 21 Jac. I. Cro. (2) 670; *Walpole v. Coldwell*, Roll. *Abr.* "Prohibition," 42; *Hartley v. Cook*, 1833, 9 Bing. 728).

When an incumbent is suspended for misconduct, the right of appointment under the canon is vested in the curate licensed by the bishop to the charge under 3 & 4 Vict. c. 86, who can and should make a general appointment, and not one limited to the period of suspension, though it does not appear that an appointment limited to the period of suspension is bad (*Pinder v. Barr*, 1854, 4 El. & Bl. 105); but when the living is only sequestrated, the right of appointment remains with the incumbent (*Lawrence v. Edwards*, [1891] 1 Ch. 144).

Before the Reformation, there were, as a rule, several clerks in each church, who sat in the chancel and sang the responsive parts of the service. After the Reformation the number of clerks was reduced to one, who in general sat in front of the reading-desk, and merely said them. The canon above mentioned further provides that the clerk shall be of the age of twenty years at the least, and known to the parson, vicar, or minister appointing, to be "of honest conversation, and sufficient for his reading and writing, and also for his competent skill in singing, if it may be." A pauper is not disqualified for the office (*R. v. Inhabitants of Bobbing*, 1836, 1 Nev. & P. 166, 5 Ad. & E. 682). The office has also been held by women; but as the office was originally conferred on persons in holy orders, it is doubtful if this is legal. The general duties of the parish clerk at the present time are to assist the minister in the performance of the various offices, as baptizing, marrying, and burying, the introduction of choral services having for the most part rendered his principal duty of making the responses obsolete. It is not necessary that the appointment of a parish

clerk should be made by deed or evidenced in writing (*R. v. Inhabitants of Bobbing, supra*). The canon above referred to directs that the appointment should be signified to the parishioners on the next Sunday during divine service, but this is not necessary to the validity of the appointment (*R. v. Inhabitants of Bobbing, supra*). After his appointment, a parish clerk is usually licensed by the ordinary; but this, again, is not necessary to the validity of the appointment (*Peak v. Bourne*, 1733, 2 Stra. 992). When he has been sworn, he takes an oath to obey the minister.

The above-mentioned constitution refers to the "accustomed alms" of the *aque bajulus*, and provides that if they are withheld, the parishioners may be compelled to render the same by ecclesiastical censure. From this it has been understood that the *aque bajulus* or clerk is not entitled to a fixed endowment, but that his sustentation shall be collected and levied according to the custom of the country, and that the parishioners may be compelled by the bishop to provide it. (On this point, further, see Lindwood, *Prov.* 143; Phillimore, *Eccles. Law*, ii. 1509–1510.) The canon above mentioned provides that the clerks are to receive their ancient wages, without fraud or diminution, either at the hands of the churchwardens, or at such times as it hath been accustomed, or by their own collection, according to the most ancient custom of every parish; and the salary of a parish clerk may be lawfully paid out of a church rate (*Kemp v. Attenborough*, 1857, 30 L. T. O. S. 211).

In addition to such salary, he also receives fees, especially on marriages and funerals. With regard to such part of his salary or fees as depend on customary payment, he must sue for them in the Courts of common law, and not in the ecclesiastical Courts (*Parker v. Clarke*, 1717, 3 Salk. 87; 6 Mod. 252; *Pitt v. Evans*, 1730, 2 Stra. 1108; *Spry v. Gallop*, 1847, 16 Mee. & W. 716). One reason for this is that although his duties are ecclesiastical, he is yet regarded as a temporal officer.

The office of a parish clerk is a freehold office at common law; and formerly, if the clerk had to be removed, it must have been done by the person who placed him in office. The ecclesiastical Courts had no power to remove, but only to censure him; and if he was improperly removed, a mandamus would lie to restore him (*Townsend v. Thorpe*, 1727, 2 Stra. 776; 2 Raym. (Ld.) 1507; *Peak v. Bourne, supra*; *R. v. Smith*, 1844, 5 Q. B. 614; *Jackson v. Courtenay*, 1857, 8 El. & Bl. 8). A remedy has, however, now been provided by the Act 7 & 8 Vict. c. 59, s. 5, which enacts that in case of neglect or misbehaviour on the part of a parish clerk not in holy orders, an archdeacon or other ordinary may summon such clerk before him, and, after examining witnesses, may suspend or remove him, and, by certificate under his hand and seal directed to the minister of the parish or place, declare the office vacant. Thereupon a copy of such certificate shall be affixed to the church or chapel door, and a new clerk shall be appointed forthwith by the persons or person entitled to make the appointment. Sec. 6 provides a summary means by which certain persons entitled to the possession of premises occupied by the clerk who has been removed or suspended, may obtain summary possession of the same by a justice's warrant, which is to be issued by such justice on the production of the bishop of the diocese's certificate of the facts. These provisions apply to a church clerk, chapel clerk, or parish clerk.

The same statute provides that a person in holy orders, as deacon or priest of the United Church of England and Ireland, may be appointed to the office; but that such person is not to acquire a freehold interest, but may be suspended or removed for the same causes as any stipendiary curate.

If the appointment is made by any person other than the incumbent, it is subject to his consent.

Under the Church Building Acts (58 Geo. III. c. 45, ss. 63, 64; 59 Geo. III. c. 134, ss. 6, 10, 11), the clerk is to be annually appointed by the minister of the church or chapel (see *Jackson v. Courtenay*, *supra*; *R. v. Inhabitants of Ossett*, 1851, 16 Q. B. 975).

Under the New Parishes Acts (6 & 7 Vict. 37; 7 & 8 Vict. c. 94, and 19 & 20 Vict. c. 104 (s. 39)), clerks are to be appointed by the incumbent for the time being of such church, and to be by him removable, with the consent of the bishop of the diocese, for any misconduct.

Under 58 Geo. III. c. 45, s. 64, the Church Building Commissioners may assign pew-rent salaries to clerks from churches built under that Act.

When parishes are divided under 58 Geo. III. c. 45, the fees and emoluments belonging to the clerk of the parish thereafter arising in any district or division of the parish, belong to the clerks of the divisions of the parish to which they shall be assigned (59 Geo. III. c. 134); but as to district chapelries, see *Roberts v. Aulton*, 1857, 2 H. & N. 432; *Ormerod v. Blackburn Burial Board*, 1873, 28 L. T. 438).

A parish clerk cannot assign his office, but he may appoint a deputy (*Peake v. Bourne*, *supra*), and the fees must be sued for by such deputy in his name (*Nichols v. Davis*, 1868, L. R. 4 C. P. 80).

A settlement is gained by serving the office of parish clerk for a year (1 Salk. 536). The word clerks used in the Prayer-Book will, it appears, refer to the choir.

[*Authorities*.—Lind. *Prov.*; Gibs. *Cod.*; Burn, *Eccl. Law*; Phillimore, *Eccl. Law*, 2nd ed.; Steel, *Parish Law*; Prideaux, *Churchwarden's Guide*, 16th ed.; Blunt, *Annotated Book of Common Prayer*.]

Parish Constables.—See CONSTABLE.

Parish Council.

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I. CONSTITUTION OF THE COUNCIL.

In every rural parish (see PARISH) which has a population of three hundred or upwards, there is now a parish council. In any rural parish

which has a population of more than a hundred but less than three hundred, the County Council must provide for establishing a parish council, if the parish meeting resolves to have one. If the population does not exceed one hundred, the County Council may, if it thinks fit, establish a parish council, but only with the consent of the parish meeting. The County Council may also group small parishes together under a common parish council, with the consent of the parish meeting of every small parish so grouped (L. G. Act, 1894 (56 & 57 Vict. c. 73), s. 1). On the other hand, the County Council may divide large rural parishes into wards for the purpose of electing parish councillors (s. 18, subs. 1). There are now 7310 parish councils in England and Wales. Every parish council is a body corporate, by the name of "The parish council of ——" (naming the parish); it has perpetual succession, and may hold land without any licence in mortmain. If there be any doubt as to the name of the parish, the County Council, after consultation with the parish meeting, may fix a name for the council. A parish council, however, does not have a common seal. Any act of the council may be signified by an instrument executed at a meeting of the council and signed (or if a seal be necessary, signed and sealed) by the chairman presiding at the meeting and two other members of the council (s. 3).

II. ELECTION OF MEMBERS AND CHAIRMAN.

Ordinary Members.—The parish councillors are elected annually by the parochial electors of the parish (see PAROCHIAL ELECTORS). There must be an election every year, because parish councillors hold office only for twelve months—from 15th April in one year till 15th April in the next. There seems to be no sufficient reason for this short tenure. Why should not parish councillors hold office for a term of three years, as do county councillors and members of the school board? However, as the law now stands, under the Parish Councillors' Election Order, 1898, a meeting for the election of parish councillors must be held on the first Monday after 10th March in any year, or if the first Monday in April is Easter Monday, on the first Monday after 3rd March; or in either case on such other day, not being earlier than the preceding Saturday or later than the following Wednesday, as may for special reasons be fixed by the County Council. The old parish council will expire, and the newly-elected councillors will come into office, on 15th April in each year.

Formerly a special parish meeting had to be called for this purpose; but now the parish councillors can be, and usually are, elected at "the annual assembly" of the parochial electors (see PARISH MEETING). This alteration will be a convenience to the inhabitants of a scattered parish, and should ensure a larger attendance at the election meeting. Opportunity must be given at the meeting for putting questions to such of the candidates as are present, and receiving explanations from them; and any candidate shall be entitled to attend the meeting and speak thereat, but, unless he is a parochial elector, not to vote. The election is regulated by rules prescribed by the Local Government Board under sec. 48 of the Act of 1894. Such rules are for the present embodied in a General Order, issued on 1st January 1898, and known as "The Parish Councillors' Election Order, 1898." The election is by show of hands. Formerly any one elector could put the parish to the expense of a poll. But now one elector has no longer the power to insist on a poll (see the Report of the Local Government Board for 1896–97, p. xlii.). The chairman may grant a poll; otherwise it must be demanded by electors present at

the meeting, not being less than five in number, or one-third of those present, whichever number is least (Sched. I. 1, r. 7).

Numbers.—The number of parish councillors is fixed by the County Council; but it must not be less than five or more than fifteen. The chairman need not be already a parish councillor; he can be elected from outside; in which case he increases the number of members of the council by one. The proceedings of a parish council are not invalidated by any vacancy occurring among the members, or by any defect in the election or qualification of any member. And until the contrary is proved, every member present at a meeting the proceedings of which are duly recorded in the proper minute-book, will be deemed to have been duly qualified and elected.

Qualification.—No one can be elected a parish councillor unless he is either a parochial elector of the parish, or has during the whole of the twelve months preceding the election “resided in the parish or within three miles thereof” (s. 3, subs. 1). But he will be deemed to have so resided if he had an abode to which he could have gone at any time, though he has not in fact occupied it every day of the time. There was, however, a difficulty created by the requirement that such residence must have continued during the whole of the twelve months preceding the election. The parish meetings for the annual election of councillors have to be held before the 25th March, and the result, therefore, was that persons, not being parochial electors, who had come to reside in the parish or within three miles thereof, at Lady Day in the previous year, were not qualified to be elected, because their period of residence was a few days less than twelve months. But now the Local Government Act of 1897 (60 Vict. c. 1, following a similar provision in the Local Government (Elections) (No. 2) Act, 1896, which, however, applied only to the elections in the year 1896) has amended the Local Government Act of 1894 in this respect. It provides that any person who has entered into residence on or before the 25th of March in any year shall, if otherwise qualified for election as a parish councillor, be eligible for election at the parish council elections of the succeeding year, notwithstanding that the period of his residence shall be under one year.

It will be observed that a person can thus be elected a parish councillor who is not a “parochial elector.” The qualification is purposely made very wide. Women, whether married or single, peers of the realm, clergymen of the Church of England, soldiers, sailors, and policemen, and the officers and servants of any county, borough, or district council, may all be elected on to a parish council.

Disqualifications.—No person is disqualified either by sex or marriage from being, or being elected, member or chairman of a parish council (though a husband and wife may not both be qualified in respect of the same property). But a person will be disqualified, if he—

- (i.) is an infant or an alien; or
- (ii.) has within twelve months before his election, or since his election, received union or parochial relief; or
- (iii.) has, within five years before his election or since his election, been convicted either on indictment or summarily of any crime, and sentenced to imprisonment with hard labour without the option of a fine, or to any greater punishment, and has not received a free pardon; or
- (iv.) has, within five years before his election or since his election, been adjudged bankrupt, or made a composition or arrangement with his creditors (but this disqualification ceases, in case of bankruptcy, when the adjudication is annulled, or when he obtains his discharge with a certificate that his bankruptcy was caused by misfortune

without any misconduct on his part; and, in case of composition or arrangement on payment of his debts in full; see *Aslatt v. Corporation of Southampton*, 18 16 Ch. D. 143; *R. v. Cooban*, 1886, 18 Q. B. D. 269; *Ward v. Radford*, 1895, 59 J. 632); or

(v.) holds any paid office under the parish council to which he seeks to be elected; (vi.) is concerned in any bargain or contract entered into with the council, participates in the profit of any such bargain or contract, or of any work done under the authority of the council (see *Nutton v. Wilson*, 1889, 22 Q. B. D. 744; *Cox v. Ambrose*, 1890, 60 L. J. Q. B. 114; *Nell v. Longbottom*, [1894] 1 Q. B. 767). He will not, however be disqualified merely because he is interested—

(a) in the sale or lease of any lands to or by the council (*R. v. Gaskarth*, 1885 Q. B. D. 321), or in any loan of money to the council; or

(b) in any newspaper in which any advertisement relating to the affairs of the council is inserted; or

(c) because he is a shareholder in a company which has made a contract with the Council. But in this last case he may not vote at any meeting of the council on a question in which such company is interested, though in the case of a water company or other company established for the carrying on of works of a like public nature, the prohibition may be dispensed with by the County Council.

If any disqualified person votes or acts as a parish councillor, he will for each offence be liable to a fine not exceeding £20, recoverable before justices in the manner provided by the Summary Jurisdiction Acts (L. G. Act, 1894, s. 46).

Declaration.—Each parish councillor must at the first meeting of the parish council after his election, or if the council at the first meeting permit, then at a later meeting fixed by the council, make a declaration in writing that he accepts the office. He must do this whether he held office as a councillor previous to the last election or not; otherwise his office will be void. The rule does not require any particular form to be used for the declaration; but it must be made in writing, and signed in the presence of some other member of the council.

III. MEETINGS AND PROCEEDINGS.

Meetings.—Every parish council must hold not less than four meetings in each year; that is, three besides the annual meeting. Every such meeting is open to the public, unless the council otherwise directs.

Annual Meeting.—The annual meeting of the parish council must be held on 15th April in each year, or within seven days after that day.

Special Meetings.—The chairman may at any time convene a meeting of the parish council. If the chairman refuses to convene a meeting of the council after a requisition for that purpose signed by two members of the council has been presented to him, any two members of the council may forthwith, on that refusal, convene a meeting. If the chairman (without expressly refusing) does not call a meeting within seven days after the receipt of such a requisition, any two members of the council may, on the expiration of those seven days, convene a meeting.

Notice of Meeting.—Three clear days at least before any meeting of the parish council, notice of the time and place of the intended meeting and the business to be transacted at it, signed by or on behalf of the chairman of the parish council or persons convening the meeting, must be given to every member of the parish council. It will be sufficient if such notice be left at, or sent by post to, the usual place of abode of such chairman or member. In the case of the annual meeting such notice must be given to every member of the new parish council immediately after his election. The old parish council cannot meet on 15th April; it has then expired. An notice must apparently be given by the retiring chairman, or if he refuse or omits to do so, by two members of the retiring council (see the Circular of the Local Government Board, issued on 8th April 1896). Until the

contrary is proved, every meeting the proceedings of which are duly recorded in the proper minute-book, will be deemed to have been duly convened and held.

Place of Meeting.—Where there is no suitable public room vested in the parish council or in the chairman of the parish meeting which can be used free of charge, any suitable room in the schoolhouse of any public elementary school receiving a grant out of moneys provided by Parliament, or any suitable room the expense of maintaining which is paid out of the local rate, may be used free of charge at all reasonable times and after reasonable notice, for meetings of the parish council or of any of its committees (s. 4). The parish council may not meet on premises licensed for the sale of intoxicating liquor, unless no other suitable room is available for such meeting either free of charge or at a reasonable cost (s. 61). The expression "premises licensed for the sale of intoxicating liquor" includes places licensed for the sale of such liquor for consumption both on and off the premises, as well as all premises holding excise licences, such as refreshment houses. Where a parish without a parish council has a parish church, the parish meeting and the parish council seem to have power to hold meetings in the vestry of the church, or if that is not large enough, then in the church itself; for they have acquired all powers in this respect which were formerly possessed by the open vestry.

Quorum.—No business can be transacted at any meeting of a parish council, unless at least one-third of the full number of members are present. And, moreover, in every case there must be at least three members present, even though the parish has less than nine councillors.

Chairman.—If the chairman of the parish council be present at the time appointed for holding the meeting, he takes the chair as of right; if he be not, the vice-chairman; if neither be present, the meeting may appoint one of their number to act as chairman of that meeting. The vice-chairman, in the absence of the chairman, has the power and authority of the chairman.

Votes.—Every question at a meeting of a parish council is decided by a majority of votes of the members present and voting on that question. If the votes be equal, the chairman of the meeting has a second or casting vote.

Minutes.—Minutes must be taken of the proceedings of the parish council in a book provided for that purpose. The names of all members present at any meeting, and the names of those voting on any question on which a division is taken, must be recorded, so as to show each vote given either for or against the question. Any minute of the proceedings of a parish council signed at the same or the next meeting by a person describing himself or appearing to be the chairman of the meeting at which the minute is signed, will be received in evidence without further proof.

IV. OFFICERS OF A PARISH COUNCIL.

There is only one officer that every parish council must have, and that is a chairman (s. 3, subs. 8). But other officers may be and sometimes are appointed, such as a vice-chairman, a treasurer, and a clerk. The parish council must also appoint the overseers of the poor of the parish.

1. *Chairman.*—The first business to be transacted at the annual meeting of every parish council is the election of the chairman of the parish council for the ensuing year (Sched. I. 2, r. 3). He must be elected either from among the parish councillors or from other persons qualified to be councillors of the parish (see *ante*, p. 385). The retiring chairman of the parish council, whether

he was elected from within or without the council, unless he resigns or ceases to be qualified or becomes disqualified, continues in office under sec. 3 (8) of the Local Government Act of 1894 until his successor is elected at the annual meeting of the council. He is himself eligible for re-election. If, however, he seeks re-election to the chair, he ought not to preside at the commencement of the annual meeting. The vice-chairman, if he has been re-elected as a councillor and is present, should preside, or the parish council may elect one of their number to preside temporarily. As soon as the new chairman is appointed, he is entitled at once to take the chair.

2. *Vice-Chairman*.—The parish council may, if it thinks fit, appoint one of its number vice-chairman. In the absence of the chairman, or if for any reason the chairman is unable to act, the vice-chairman will have all the powers and authority of the chairman.

3. *Treasurer*.—The parish council may appoint one of its own number or some other person, to act as treasurer without remuneration; but must give such security as may be required by the regulations of the County Council.

4. *Clerk*.—A parish council may appoint one of its number to act as clerk of the council without remuneration. If no member of the parish council is appointed so to act, then an assistant overseer may be appointed by the council, and his duties as clerk of the parish council will be taken into account in determining his salary (s. 17). If there is no assistant overseer the council may appoint a collector of poor rates, or some other fit person to be their clerk, with such remuneration as they may think fit. Once a clerk, paid or unpaid, has been appointed, it is not necessary to reappoint him each succeeding year; he will continue clerk till the period for which he was appointed has expired (Circular of the Local Government Board of 8th April 1896). When a parish council acts as a parochial committee by delegation from the district council under sec. 15, it will have the services of the clerk of the district council, unless the district council otherwise directs.

It is the duty of the clerk to take notes of the proceedings of the parish council, and to enter the minutes in the book provided by the parish for that purpose. The parish council may appear before any Court or in any legal proceeding by their clerk, or by any officer or member authorised generally or in respect of any special proceeding by resolution of the council; and their clerk or any member or officer will, if so authorised, be at liberty to institute and carry on any proceeding which the parish council has authorised to institute and carry on (Sched. I. 2, r. 16).

5. *Overseers*.—As soon as the chairman of the parish council has been elected, the next business at the annual meeting of the parish council will be the appointment of the overseers. See the "Memorandum as to the Appointment of Overseers by Parish Councils under the Local Government Act 1894," issued by the Local Government Board to clerks to parish councils on the 16th February 1895. Notice of the appointment of the overseers must be given to the guardians of the union in the form prescribed by the Board's Order of the 9th February 1895. See also OVERSEERS, vol. ix. p. 33.

6. *Assistant Overseer*.—The power of appointing and of revoking the appointment of an assistant overseer for any parish that has a parish council is now transferred to the parish council by sec. 5 of the Local Government Act of 1894.

7. *Waywardens, etc.*—In the vast majority of rural districts the rural district council has now become the highway authority of the parish under sec. 25 of the L. G. Act, 1894. But in a few parishes the operation of this section, so far as it relates to highways, has been postponed for a period of

an order of the Local Government Board. In these parishes it is the duty of the parish council to elect a surveyor of highways, or one or more waywardens, in accordance with the former practice.

V. POWERS AND DUTIES OF A PARISH COUNCIL.

The legal interest in all property which at the passing of the Local Government Act, 1894, was vested either in the overseers or in the churchwardens and overseers of a rural parish (other than property connected with the affairs of the church, or held for an ecclesiastical charity) was by that Act vested in the parish council, and the same Act transferred to the parish council of every rural parish—

1. The powers, duties, and liabilities of the vestry of the parish, except so far as relates to the affairs of the church or to ecclesiastical charities.

2. The powers, duties, and liabilities of the churchwardens of the parish, except so far as they relate to the affairs of the church or to charities, or are powers and duties of overseers, but inclusive in certain cases of the obligations of the churchwardens with respect to maintaining and repairing closed churchyards wherever the expenses of such maintenance and repair are repayable out of the poor rate under the Burial Act, 1855.

3. The powers, duties, and liabilities of the overseers or of the churchwardens and overseers of the parish with respect to—

- (i.) appeals or objections by them in respect of the valuation list, or appeals in respect of the poor rate or county rate, or the basis of the county rate; and
- (ii.) the provision of parish books and of a vestry room or parochial office, parish chest, fire engine, fire escape, or matters relating thereto; and
- (iii.) the holding or management of parish property not being property relating to affairs of the church or held for an ecclesiastical charity (including all parish books and documents, see *Lewis v. Poole*, [1898] 1 Q. B. 164); and the holding or management of village greens or of allotments, whether for recreation grounds or for gardens, or otherwise for the benefit of the inhabitants or any of them.

4. The powers exercisable with the approval of the Local Government Board, by the Board of Guardians for the poor law union comprising the parish in respect of the sale, exchange, or letting of any parish property.

5. Power to provide or acquire (by agreement or under certain restrictions compulsorily) buildings, or land for buildings, for public offices and for meetings, and for any purposes connected with parish business, or with the powers or duties of the parish council or parish meeting.

6. Power to provide or acquire (by agreement or under certain restrictions compulsorily) land for a recreation ground and for public walks.

7. Power to apply to the Board of Agriculture under sec. 9 of the Commons Act, 1876.

8. Power to exercise with respect to any recreation ground, village green, open space, or public walk, which is for the time being under their control, or to the expense of which they have contributed, such powers as may be exercised by an urban authority under sec. 164 of the Public Health Act, 1875, or sec. 44 of the Public Health Acts Amendment Act, 1890, in relation to recreation grounds or public walks; and secs. 183 to 186 of the Public Health Act, 1875, shall apply accordingly as if the parish council were a local authority within the meaning of those sections.

9. Power to utilise any well, spring, or stream within their parish, and provide facilities for obtaining water therefrom.

10. Power to deal with any pond, pool, open ditch, drain, or place containing, or used for the collection of, any drainage filth, stagnant water, or matter likely to be prejudicial to health, by draining, cleansing, covering it, or otherwise preventing it from being prejudicial to health.

11. Power to acquire by agreement any right of way, whether within their parish or an adjoining parish, the acquisition of which is beneficial to the inhabitants of the parish or any part thereof.

12. Power to accept and hold any gifts of property, real or personal, for the benefit of the inhabitants of the parish or any part thereof.

13. Power to execute any works (including works of maintenance or improvement) incidental to or consequential on the exercise of any of the foregoing powers, or in relation to any parish property, not being property relating to affairs of the church or held for an ecclesiastical charity.

14. Power to contribute towards the expense of doing any of the things above mentioned, or to agree or combine with any other parish council to do or contribute towards the expense of doing any of the things above mentioned.

15. Power under certain restrictions to let, or with the consent of the parish meeting to sell or exchange, any land or building vested in the council (ss. 8, 9).

16. Power to hire land for allotments, and, on certain conditions and under certain restrictions, compulsorily (s. 10).

17. Power to accept a transfer of any property held by trustees for a public recreation ground, or for public meetings, or for allotments, or otherwise for the benefit of the inhabitants of a rural parish, or for any public purpose connected with a rural parish except for an ecclesiastical charity, and to hold such property on the trusts and subject to the conditions on which such trustees held the same.

18. Power to appoint additional members of the governing body of any parochial charity, other than an ecclesiastical charity which has been founded for forty years, but which does not include any persons elected by the ratepayers or inhabitants of the parish (s. 14).

19. Where overseers are *ex officio* trustees of any parochial charity forty years old, and where churchwardens are *ex officio* trustees of any non-ecclesiastical parochial charity forty years old, the parish council may appoint other trustees in their place.

20. Where prior to 1894 the vestry appointed trustees or beneficiaries of any non-ecclesiastical parochial charity, that power is now exercised by the parish council.

21. The draft of every scheme relating to a non-ecclesiastical parochial charity must be submitted to the parish council (s. 14).

22. A rural district council may delegate to a parish council any power which may be delegated to a parochial committee under the Public Health Acts, and thereupon those Acts will apply as if the parish council were a parochial committee (s. 15).

23. A parish council has also power to complain to the County Council that the district council has made default in providing the parish with sewers, or with a water supply, or in the repair of any highway, or in the enforcement of any provisions of the Public Health Acts (s. 16).

24. The same power of making any complaint or representation as to unhealthy dwellings or obstructive buildings as is conferred on inhabitant householders by the Housing of the Working Classes Act, 1890, but without prejudice to the powers of such householders.

25. The same power of making a representation with respect to allotments, and of applying for the election of allotment managers, as is conferred on parliamentary electors by the Allotments Act, 1887, or the Allotments Act, 1890, but without prejudice to the powers of those electors.

26. Where any Act constitutes any persons wardens for allotments, or authorises or requires the appointment or election of any wardens, committee, or managers for the purpose of allotments, the powers and duties of such wardens, committee, or managers must be exercised and performed by the parish council, and it shall not be necessary to make the said appointment or to hold the said election. For the purpose of sec. 16 of the Small Holdings Act, 1892, two members of the parish council are substituted for allotment managers or persons appointed as allotment managers.

27. When the parish meeting has adopted any of the Acts which are referred to in the Local Government Act of 1894 as "the adoptive Acts," namely—

- (a) The Lighting and Watching Act, 1883 ;
- (b) The Baths and Washhouses Acts, 1846 to 1882 ;
- (c) The Burial Acts, 1852 to 1885 ;
- (d) The Public Improvements Act, 1860 ;
- (e) The Public Libraries Act, 1892 ;

the parish council shall be the authority for the execution of such Act ; and where the area under any former authority acting within a rural parish in the execution of any of the adoptive Acts is coextensive with the parish, all powers, duties, and liabilities of that authority are transferred to the parish council.

By the 58 & 59 Vict. c. 18, a parish council has also power to guarantee the Postmaster-General against any loss sustained by him through the provision of extra postal facilities for the parish. As to sale of parish lands, when materials for the repair of roads are exhausted, see 8 & 9 Vict. c. 71.

VI. RESTRICTIONS ON EXPENDITURE.

Cheques.—Every cheque or other order for payment of money by a parish council must be signed by two members of the council (Sched. I. 2, r. 14).

Audit.—The accounts of the receipts and payments of parish councils must be made up yearly to the 31st day of March, and must be audited by a district auditor. The enactments relating to audit by district auditors of accounts of urban sanitary authorities and their officers (*e.g.* the Public Health Act, 1875, ss. 247 and 250, the District Auditors Act, 1879, s. 5) apply to such an audit. Every parochial elector of a rural parish may, at all reasonable times, without payment, inspect and take copies of and extracts from all books, accounts, and documents belonging to or under the control of the parish council or parish meeting (s. 58).

Rates.—A parish council may not, without the consent of a parish meeting, incur expenses or liabilities which will involve a rate exceeding threepence in the pound for any local financial year, or which will involve a loan. It may not, without the approval of the County Council, incur any expense or liability which will involve a loan. The sum raised in any local financial year by a parish council for their expenses (excluding expenses under any adoptive Act, but including any annual charge in respect of a loan) must not exceed a sum equal to a rate of sixpence in the pound on the rateable value of the parish at the commencement of the year (s. 11).

Loans.—With the consent of both the County Council and the Local Government Board, a parish council may borrow money for certain purposes—

(a) for purchasing any land, or building any buildings, which the council is authorised to purchase or build; and

(b) for any purpose for which the council is authorised to borrow under any of the adoptive Acts; and

(c) for any permanent work or other thing which the council is authorised to execute or do, and the cost of which ought, in the opinion of the County Council and the Local Government Board, to be spread over a term of years.

Such money must be borrowed on the security of the poor rate and of the whole or part of the revenues of the parish council. The sum borrowed must not exceed one-half the assessable value of the parish. It may be lent by the County Council (s. 12). See also BORROWING POWERS, vol. ii. at p. 220.

As to the power of the joint committee of an urban district council and a parish council to borrow money for the purposes of the Burial Acts, 1852 to 1885, see Local Government Act, 1894, s. 53, and the Local Government (Joint Committees) Act, 1897 (60 & 61 Vict. c. 40).

Parishioner.—"Parishioner is a very large word, and takes in not only the inhabitants of the parish, but persons who are the occupiers of land that pay the several rates and duties, though they are not resident, nor do contribute to the ornaments of the church" (Lord Hardwicke in *A.-G. v. Parker*, 1747, 3 Atk. 577, approved in *Etherington v. Wilson*, 1875, 1 Ch. D. 160).

"Inhabitants is still a larger word, and takes in housekeepers, though not rated to the poor; and takes in also persons who are not housekeepers, as, for instance, such who have gained a settlement, and by that means become inhabitants" (Lord Hardwicke *supra*; see also *Fearon v. Webb*, 1807, 14 Ves. 13).

A person not resident in a parish, but owning property within it in respect of which he pays parish rates, is a parishioner, and entitled to sue

as such (*Bulten v. Gedye*, 1889, 41 Ch. D. 507). As the word parishioner, in its ordinary sense, means a person occupying premises which are liable to be rated to the poor of the parish, if a man takes a house temporarily, for the purpose of qualifying himself for some privilege as a parishioner thereby, if he pays rent and taxes, he will be a parishioner (*Etherington v. Wilson*, 1875, 1 Ch. D. 160).

Under the New Parishes Acts (as to which, see articles PARISH; ECCLESIASTICAL COMMISSIONERS), the resident inhabitants within any new parish created, or hereafter to be created, under these Acts shall, for all ecclesiastical purposes, be parishioners thereof and of no other parish (19 & 20 Vict. c. 104).

In the case of a union of benefices, sec. 6 of the Union of Benefices Acts Amendment Act (34 & 35 Vict. c. 90) provides: When any church shall have been so constituted a parish church, the persons residing within the limits of the said united or separate benefice shall, subject as in this Act mentioned, have the same rights, be entitled to the same privileges, and be subject to the same obligation in respect to such church as if the same church had always existed as such parish church.

Parishioners paying scot and lot, at common law constituted the vestry (as to the present constitution and power of the vestry, see article VESTRY). As to the rights and duties of parishioners in respect to civil matters generally, see articles PARISH; PARISH COUNCIL; POOR LAW; OVERSEERS. As to the rights of parishioners in respect to burial in the parish church, see article CHURCHYARD.

By the rubric in the Book of Common Prayer, every parishioner shall communicate, at the least, three times in the year, of which Easter is to be one. (See also Canons of 1603, 21, 28, 112, 214, and 263.)

By the rubric at the end of the confirmation service, "There shall be none admitted to the holy communion until such time as they be confirmed, or be ready and desirous to be confirmed."

By Constitutions of Archbishop Peckham, no priest should administer this sacrament to the parishioner of another priest without his clear licence; but this does not apply to travellers and cases of necessity (Lind. p. 232).

Travellers are, for this purpose, parishioners of every parish (Lind. p. 232).

A parishioner, assuming him to have been baptized and confirmed, had apparently, at common law, a right to partake of the communion in his parish church, unless deprived of it for "lawful cause." See 1 Edw. VI. c. 1, s. 8.

What would in the eyes of the law constitute a lawful cause cannot be strictly defined. The rubric before the communion service contemplates the repulsion of notorious and evil livers, or such as have done any wrong to their neighbours by word or deed so that the congregation is thereby offended, or of those betwixt whom the curate shall see malice or hatred to reign. Such persons shall not be admitted without penitence or amendment. The minister so repelling any person must give an account to the ORDINARY within fourteen days, and the ordinary shall proceed against the offending person according to the Canon 27 of 1603, which provides for the repulsion from the communion of—

(1) Any that refuse to be present at public prayers, according to the orders of the Church of England. (2) Common and notorious depravers of the Book of Common Prayer and administration of the sacraments, the articles, or the book of ordination of priests and deacons. (3) Depravers of the royal authority in ecclesiastical matters: unless the person so offending shall acknowledge his repentance.

Canon 109 also directs the exclusion of such as have given offence to their brethren by adultery, drunkenness, usury, and other flagrant offences.

It must be stated, however, that it is doubtful whether the canons, as not binding the laity, can prescribe causes which will be held sufficient and lawful within the statute. In any case, the Courts are disposed to take an exceedingly strict view of the right of a minister to refuse a parishioner the sacrament (see *Jenkins v. Cook*, 1876, 1 P. D. 80. (It must, however, be remembered that the judgment of the Privy Council in that case turned largely on their belief that the opinions erroneously, on the evidence, attributed to the appellant in the Court below, namely, the Court of Arches, could be entertained or expressed by a layman or clergyman consistently with the law and with his remaining in communion with the Church.)) (See also *Swayne v. Benson*, 1889, 6 T. L. R. 7, as to the refusal to administer this sacrament to a member of the Wesleyan body. In that case, however, the defendant did not appear).

By the rubric, "so many as intend to be partakers of the holy communion shall signify their names to the curate at least some time the day before."

How far this rubric is declaratory only is not perfectly clear (see *Clovell v. Cardinall*, 12 Car. 2; 1 Sid. 34; *Stewart v. Crommelin*, 1852, a judgment of the Consistorial Court of Armagh, referred to in *Clifton v. Ridsdale*, 1876, L. R. 1 P. D. pp. 331, 347).

It was decided in a recent case (*In re Perry Almshouses*, [1898] 1 Ch. 391) that a parochial charity of which the objects were to be selected from persons who should have regularly attended divine service at the parish church for a fixed period, been partakers of the holy communion, lived a godly, righteous, and sober life to the honour of God's holy name, and that the trustees should be members of the Church of England, was an ecclesiastical charity within sec. 75 of the Local Government Act, 1894, and that the endowment was held for the benefit of members of the Church of England.

At common law the parishioners were under a liability to repair the body of the church, and in some cases, by custom, the chancel (see articles PARISH CHURCH; NAVE; CHANCEL). They were further liable to provide necessary books and ornaments for the church; but they could not be charged with the expense of new ornaments, except with their consent, as well as that of the ordinary (*Butterworth v. Walker*, 1765, 3 Burr. 689), and they could not be bound, even by the unanimous consent of the vestry, for an expense (e.g. the repair of an organ which was not absolutely necessary (*Jury v. Wiblis*, 1830, 3 Hugh. 4)). The abolition of the legal enforcement of church rates, however, has practically removed the liability (see further, article VESTRY; and also, as to necessary articles to be provided, see article CHURCHWARDEN).

The consent of the parishioners is not necessary to a faculty authorising alterations in a parish church, or the introduction of new ornaments (*Butterworth v. Walker*, *supra*).

On the other hand, in matters relating to the picturesque and architectural appearance of the church, considerable attention will be paid to the wishes of the parishioners generally. Yet on matters relating to the comfort and convenience of those who attend church, the Court will especially consider the interests of church-goers (*Vicar of Tottenham v. Venn*, 1874, L. R. 4 Ad. & Ec. 221).

So far as parishioners are legally liable to put things in the church into

decent order, the degree of decency necessary must be determined by the opinion of the majority (7 Mod. 70).

As to the rights of a parishioner to restrain by proceedings illegal conduct on the part of the incumbent under the Public Worship Regulation Act, 1877, and generally, see articles DISCIPLINE, ECCLESIASTICAL; PUBLIC WORSHIP REGULATION ACT; see also POOR LAW; OVERSEERS; CHURCHWARDEN; VESTRY.

Parish Meeting.—The parochial electors of every rural parish must meet once at least in every year. This meeting is called “the annual assembly”; and by subsec. (3) of sec. 2 of the L. G. Act, 1894 (56 & 57 Vict. c. 73), it was required to be held on 25th March, or within seven days before or after that day. But this has been altered by the L. G. Act, 1897 (60 Vict. c. 1), which allows the annual assembly to be held on any day between 1st March and 1st April, both inclusive, in any year. In every rural parish, which has no separate parish council, the parochial electors must meet at least twice a year—once, that is, in addition to the annual assembly (L. G. Act, 1894, s. 19, subs. 2). All persons, male or female, who are registered as electors on either the parliamentary or the local government registers for the parish are entitled to attend the parish meeting, which is thus a larger body than the former vestry. In certain cases a parish meeting may be held for a parish ward or other part of a parish; and such a meeting can only be attended by parochial electors registered in respect of qualifications in that ward or part (s. 49).

A special parish meeting may be convened at any time in any one of four ways:—

- (a) by any six parochial electors;
- (b) by the chairman of the parish meeting, if one has been appointed;
- (c) by the chairman of the parish council, if there is one;
- (d) by any two parish councillors (s. 45, subs. 3).

In every case, public notice, specifying the time and place of the intended meeting and the business to be transacted at it, must be given not less than seven days before the meeting, or, if the business relates to the establishment or dissolution of a parish council or grouping of a parish (*ante*, p. 384), or the adoption of any of the adoptive Acts (*ante*, p. 390), not less than fourteen days before the meeting.

A parish meeting may not be held in premises licensed for the sale of intoxicating liquor, unless no other suitable room is available for such meeting either free of charge or at a reasonable cost (s. 61). If there is no suitable room belonging to the parish, the parochial electors are entitled to use, free of charge, for their meeting, at all reasonable times and after reasonable notice, any schoolroom or other room maintained out of any local rate (s. 4). The proceedings must not commence before 6 p.m. If a parish council exists in the parish, its chairman is entitled to preside at every parish meeting, if he is present and is a parochial elector, and is not a candidate for election at that meeting (s. 45, subs. 2). In other cases the first business at the annual assembly is to elect a chairman for the parish meeting for the year (s. 19, subs. 1). At the annual assembly the parishioners present may now also elect the members of their parish council, if there be one in the parish.

The powers and duties of a parish meeting depend largely on whether there is or is not a parish council for the parish. If there is, the most important duty of the parish meeting is to elect the parish councillors (see

PARISH COUNCIL, *ante*, at p. 385). But whether there is or is not a parish council for the parish, the parish meeting may always discuss parish affairs and pass resolutions thereon. If there is a parish council, that body may make orders regulating the proceedings and business at parish meetings. If there is no council for the parish, the parish meeting will, subject to the Act, regulate its own proceedings and business. Every question arising at a parish meeting is decided in the first instance by the majority of those present and voting on the question. Each parochial elector has one vote and no more on any question, except where more than one person has to be elected to some office, when each parochial elector has as many votes as there are persons to be elected. If the votes be equal, the chairman has a casting vote. The voting is by show of hands; but in certain cases a poll may be demanded, which will be taken by ballot. The reasonable expenses of and incidental to the holding of a parish meeting or the taking of a poll are paid out of the poor rate (s. 11, subs. 4). Minutes of the proceedings must be taken and kept in a book provided for the purpose. Any notice required to be given to or served on a parish meeting may be given to or served on the chairman of the parish meeting.

Every parish meeting, whether in a parish having a parish council or not, has power, to the exclusion of all other authorities, to adopt for the parish any of the so-called "adoptive Acts," *i.e.* the Lighting and Watching Act, the Baths and Washhouses Act, the Burial Acts, the Public Improvements Act, and the Public Libraries Act. It also has power to order the raising of a fund for the emigration of poor persons settled in the parish. It has partial control over the disposition of parish property. Where the population of a parish not having a parish council increases so as to justify the election of such a council, the parish meeting may petition the County Council to establish a parish council for the parish. Similarly, where the population of the parish according to the last census is less than two hundred, the parish meeting may petition the County Council to dissolve the parish council. The parish meeting may also apply to the Education Department to form or to dissolve a School Board. The accounts of every non-ecclesiastical parochial charity must be laid annually before the parish meeting (s. 14, subs. 6).

Where there is a parish council, its action is still for some purposes controlled by the parish meeting. The parochial electors in parish meeting assembled may veto any proposal to stop or divert any public right of way (see HIGHWAYS, vol. vi. p. 197), may give or withhold their consent to the parish council supporting or opposing any scheme of the Charity Commissioners relating to a charity, or to the sale or exchange of any land or buildings, or to the incurring of any expense which would involve a loan or a rate exceeding threepence in the pound.

Where there is no parish council, the parish meeting has much wider functions. It has many of the powers which would otherwise have devolved on the parish council, many that were formerly enjoyed by the vestry; and the County Council may confer on it any other of the powers of a parish council. Thus it has all the powers, duties, and liabilities of the vestry, except such as relate to the affairs of the church or to ecclesiastical charities, or are by the L. G. Act of 1894 expressly given to any other authority. It may veto any proposal to stop or divert any public right of way or to declare any highway unnecessary (see HIGHWAYS, vol. vi. pp. 191, 197). It may lodge a complaint with a County Council to the effect that a district council has made default in providing the parish with sewers or with a water supply,

or in the repair of any highway, or in the enforcement of any provisions of the Public Health Acts. A parish meeting has the power of appointing overseers and assistant overseers, and trustees of charities in the place of overseers or churchwardens. Its chairman and the overseers are a body corporate; the parish property vests in them, and they may hold land for parish purposes without a licence in mortmain. But it has none of the powers of a burial board; and will not, therefore, in the absence of a special order, own the cemetery, if any. Such a parish meeting may levy a rate not exceeding sixpence in the pound, inclusive of the rate required for the administration of any of the adoptive Acts; and its accounts must be made out and will be audited in the same way as the accounts of a parish council (s. 58, and see *ante*, p. 391). Lastly, the parish meeting may appoint a committee of their own number for any purposes which, in the opinion of the parish meeting, would be better regulated and managed by means of such a committee, and all the acts of the committee shall be submitted to the parish meeting for their approval (s. 19). This power is of extreme importance in the case of a parish which has obtained from the County Council the powers of a parish council, and thus put itself in the position of a parish having a parish council; as an executive body which consisted of the whole of the ratepayers of the parish might easily be too large for the efficient administration of the details of parochial work.

Parish Register.—This phrase has two meanings. It is often used to denote “the register of parochial electors of the parish,” defined by sec. 44 of the Local Government Act, 1894 (56 & 57 Vict. c. 73); see PAROCHIAL ELECTORS, *post*, p. 415. It more properly means the registers of births, deaths, and marriages which are kept by the rector, vicar, or other officer of the parish. For the history of the present system of parochial registration and the existing law on the subject, see BIRTHS, REGISTRATION OF, vol. ii. p. 152; DEATHS, REGISTRATION OF, vol. iv. p. 140; and REGISTRAR-GENERAL. Although all other public books, writings, and papers belonging to the parish are, by the Local Government Act, 1894, placed under the control of the parish council (see *Lewis v. Poole*, [1898] 1 Q. B. 164), it is expressly provided by sec. 17, subsec. 8 of that Act, that the registers of baptisms, marriages, and burials, and all other books and documents containing entries wholly or partly relating to the affairs of the church or to ecclesiastical charities, shall remain in the same custody as before the passing of the Act.

Paritor.—See APPARITOR.

Park-bote, to be quit of enclosing a park or any part thereof (Cowel. 4 *Inst.* 308).

Parkhurst Prison, in the Isle of Wight, was erected for the confinement and correction of young offenders, male and female, both for those under sentence of penal servitude and those under sentence of imprisonment.

Parliament.

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Introductory.—The word Parliament came into use in the thirteenth century to signify a session of the royal council for judicial administrative and legislative business. In addition to the judges and principal servants of the Crown, a select number of barons and prelates holding by barony were summoned to attend; and, later in the century, representatives of the shires and boroughs were also summoned through the sheriff, and representatives of the lower clergy through the bishops. On these occasions the Crown obtained assent to legislation and taxation, but the main business, as appears from the early Parliament Rolls, was to dispose of, or put in train for settling, the numerous petitions addressed to the King in Council, or the King in Council in Parliament, appealing from the judgments of the Courts below, or seeking new remedies, or asking favours, or complaining of the oppressions of the royal sheriffs, bailiffs, etc., throughout the kingdom. It is now thought probable that the representatives of the shires and boroughs were first summoned, not merely to give assent to taxation, but to assist with their local knowledge in disposing of these petitions. Among the petitions from individuals occur petitions from single counties or boroughs, and these were probably in charge of their representatives. Occasionally, the Commons are found uniting to petition against some general grievance, or the baronage, as in the case of *Quia emptores*, seeking an alteration of the law in a matter specially affecting their order. The legislative initiative of both Houses may here be traced. In the fourteenth century the King in Council became distinct from the King in Parliament, and Parliament acquired its present meaning of a representative assembly of the three estates organised in two Houses. The official element, however, continued to be present in the person of the judges and others summoned in the inferior capacity of assistants to the House of Lords; and that House also retained a power of judicature. The Parliament Rolls of this period are almost entirely taken up with the petitions of the Lords and Commons and the King's answers, and such petitions of individuals as they had adopted (the origin of Private Bill Legislation, *q.v.*); but petitions of individuals continued to be dealt with in Parliament, though many of them were presented to the Council, or the Chancellor. Answers to public petitions involving a permanent alteration in, or addition to, the law, were afterwards embodied in statutes, and entered on the Statute Roll. The Parliament Rolls contain a record of parliamentary proceedings from 1278 to 1503. The Lords' Journals commence in 1509, and the Commons' Journals in 1547. It is not possible to deal with the further growth of Parliament, the introduction of legislation by bill, the assertion of parliamentary privileges, the eventually successful resistance to unparliamentary legislation and taxation, or the stages by which the House of Commons established its control over the executive. This article must be confined to the present constitution and powers of Parliament, so far as they have not been already dealt with under other heads.

Constitution.—The Parliaments of England and of Scotland were merged

in the Parliament of Great Britain, and the Parliaments of Great Britain and of Ireland were merged in the Parliament of the United Kingdom by the Acts of Union with Scotland and Ireland. The constituent parts of Parliament are the Queen, the HOUSE OF LORDS (*q.v.*), and the HOUSE OF COMMONS (*q.v.*).

Summons.—The prerogative of summoning Parliament is in the Crown. It is subject to the statutory restriction in the Triennial Act, 6 & 7 Will. & Mary c. 2, that a new Parliament must be summoned within three years of a dissolution; but it is practically necessary for Parliament to meet every year for the purpose of passing the annual Army Act and voting the annual taxes; and it is now customary to call a new Parliament in the proclamation dissolving the old one. The royal proclamation ordering the Chancellors of Great Britain and Ireland to issue writs is made by the advice of the Privy Council and passed under the Great Seal. Under 15 Vict. c. 25, the writs are now made returnable within not less than thirty-five days. Special writs are sent to the persons entitled to summons to the House of Lords (*q.v.*), with the exception of Scotch representative peers. Under 6 Anne, c. 78, and 14 & 15 Vict. c. 100, the peers of Scotland are summoned by proclamation in all the county towns of Scotland to meet within ten days, and proceed to the election of sixteen representative peers for the new Parliament. Pursuant to 10 & 11 Vict. c. 52, peerages in respect of which no vote had been given since 1800, were struck off the roll of the Peers of Scotland, and no vote can be given in respect of them unless they have been restored by order of the House of Lords. Any two Scotch peers may enter a protest against the right of anyone claiming to vote, leaving the decision to the Committee for Privileges. When a claim to vote has been allowed, no one else may claim to vote in respect of the same peerage during the successful claimant's life. A list of the elected Scotch peers is signed and sealed by the Lord Clerk Register in presence of the assembled Scotch peers, and returned to the Clerk of the Crown in Chancery.

The proceedings on the issue of writs for the election of members of the House of Commons are dealt with under ELECTIONS, and the right to vote at such elections under FRANCHISE (ELECTORAL).

Disqualifications for Sitting and Voting.—Some disqualifications for sitting and voting in Parliament apply both to the House of Lords (*q.v.*) and to the House of Commons. Some are peculiar to the House of Commons. The principal disqualifications for sitting and voting in the House of Commons are the following (for fuller information, see Rogers on *Elections*, vol. ii. ch. 1):—(1) Aliens, disqualified at common law, and under the Act of Settlement; but if naturalised, they are now treated as entitled to sit under sec. 7 of the Naturalisation Act, 1870. (2) Infants, now expressly by 7 & 8 Will. III. c. 25, s. 7, and by other statutes as regards Scotland and Ireland. (3) Lunatics; the House of Commons would not vacate a seat for lunacy unless it were incurable; but now, by 49 Vict. c. 16, notification must be given to the Speaker if a member is confined as a lunatic, and unless he recover within six months, the seat is vacated. (4) Women. (5) Peers; but, under the Act of Union, Irish peers, not being representative peers, may sit for British constituencies, their privileges of peerage being suspended for the time being. If a member of the House of Commons, on succeeding to a peerage, delay to apply for his writ of summons to the House of Lords, the House of Commons may ascertain the fact of his succession for itself, and order a new writ to issue, per Lord Selborne's case (Rogers, 385, 386). (6) Clergy.—Under 41 Geo. III. c. 63,

persons ordained priests or deacons, and ministers of the Church of Scotland; under 10 Geo. IV. c. 7, s. 9, persons in holy orders in the Church of Rome; but under 33 & 34 Vict. c. 91, clergymen of the Church of England may renounce their clerical character and escape this disability. (7) Returning officers at parliamentary elections for the constituencies in which they act as such. (8) Holders of new offices *under* the Crown created since 25th October 1705, are incapable of being elected or of sitting and voting, 6 Anne, c. 4, s. 24, unless a statutory exception has been made in favour of such new office. By sec. 25, members of the House of Commons accepting *from* the Crown old offices, that is to say, offices created before 1705, vacate their seats, but may be re-elected. Sec. 27 contains an exception in favour of officers in the army and navy accepting a new commission. Now by 30 & 31 Vict. c. 102, where a member has been returned after accepting of any of the offices compatible with sitting, he does not vacate his seat by accepting another of these offices in substitution. Offices which are not accepted *from* the Crown, such as the Under-Secretaryships of State, do not necessitate re-election, and this also applies to a few other offices by statute. Under 27 & 28 Vict. c. 28, s. 34, not more than four Under-Secretaries of State may sit in the House of Commons at the same time. If five are returned at once, none can sit until their number is reduced to four. As to offices under the Lord Lieutenant of Ireland, see 41 Geo. III. c. 52. (9) Pensioners from the Crown, during pleasure, are also disqualified by 6 Ann, c. 41, s. 24; but this does not apply to Civil Service or diplomatic pensions under 32 & 33 Vict. cc. 15, 43. (10) The judges of the Supreme Court of Judicature in England and Ireland, by 38 & 39 Vict. c. 77, s. 5; 40 & 41 Vict. c. 57, s. 13; Scotch judges by 7 Geo. II. c. 16, s. 4. (11) Contractors, on account of the public service, 22 Geo. III. c. 45, s. 1; 47 & 48 Vict. c. 16. (12) Bankruptcy—By 46 & 47 Vict. c. 52, s. 32, a debtor adjudged bankrupt in England or Scotland is disqualified to be elected or sit and vote in Parliament, and his seat in the House of Commons is vacated unless the bankruptcy is annulled within six months, or he obtains a certificate that it was caused by misfortune without any misconduct on his part. By 53 & 54 Vict. c. 71, s. 9, the period of disqualification is not to exceed five years from the date of discharge. A person adjudged bankrupt in Ireland is capable of election; if a member, he vacates his seat, unless within one year from adjudication the bankruptcy is annulled or the creditors satisfied (35 & 36 Vict. c. 58). (13) Persons convicted in England and Ireland of treason or of felony, followed by a sentence with hard labour, or exceeding twelve months, are incapable of being elected or of sitting and voting (33 & 34 Vict. c. 23, s. 2) until they have served their sentences. Convictions for misdemeanour do not disqualify, but if of a disgraceful nature may be visited with expulsion, as in some recent cases. (14) Persons found guilty of CORRUPT PRACTICES (*q.v.*) are disqualified by 46 & 47 Vict. c. 51 for ever in respect of the constituency where the offence was committed, and for seven years in regard to other constituencies.

Vacating of Seats.—A member of the House of Commons may vacate his seat by becoming subject to any of the above disqualifications, or by sitting and voting without taking the oath, or by a resolution of the House declaring the seat vacant. At common law, a member returned to Parliament is bound to serve, and cannot resign, but may do so in practice by accepting the CHILTERN HUNDREDS (*q.v.*). As to the issue of new writs to supply such vacancies, see ELECTIONS.

Privileges of Parliament.—See HOUSE OF COMMONS; HOUSE OF LORDS;

in which articles the subject of contempt of Parliament is also dealt with.

Procedure.—Parliament is opened by the sovereign in person, or by commission under the Great Seal. The election of the Speaker by the House of Commons is then proceeded with (see HOUSE OF COMMONS), and members of both Houses must take the oath or declaration of allegiance (see OATH OF ALLEGIANCE; OATHS). The Commons are summoned to hear the Queen's speech. The speech is afterwards taken into consideration in either House, and an address in answer voted, but a bill is first read *pro forma* to assert the control of the House over its own business. The Crown may also communicate with both Houses by message during session. The subject of parliamentary procedure, which is similar in both Houses, has already been dealt with under HOUSE OF COMMONS.

Legislative Power of Parliament.—The legislative power of Parliament is in the Queen in Parliament. Bills must pass the two Houses and receive the royal assent (see ASSENT, ROYAL). Communications between the two Houses are carried on by messages. In case one House refuses to accept the amendments introduced into a Bill by the other, the Bill is returned, with a message stating reasons for so disagreeing; or the disagreement may form the subject of a formal conference, but this is now disused. See further, HOUSE OF COMMONS; PRIVATE BILL LEGISLATION; PROVISIONAL ORDER; STATUTORY RULES AND ORDERS.

Judicature of Parliament; the Judges.—The judicature of Parliament is vested in the HOUSE OF LORDS (*q.v.*). See also APPEALS; IMPEACHMENT; LORD HIGH STEWARD. The position of the judges as assistants to the House of Lords may here be dealt with. Writs of summons are now sent to the judges of the High Court of Justice not being peers, and to the Attorney and Solicitor General, but the latter do not attend. The Lords Justices of Appeal are not summoned. The attendance of the judges is regarded not as a privilege, but as a duty. The House formerly endeavoured to insist on the presence of the judges at every sitting, but they do not now attend unless by order of the House. Before the Judicature Acts, they were frequently summoned to assist in the hearing of appeals, but since then they have only been summoned twice, in *Angus v. Dalton*, 6 App. Cas. 740, and in the recent case of *Allen v. Flood*, [1898] App. Cas. 1. In that, as in many other cases, the House did not follow the opinion of the majority of the judges. The judges cannot be required to give their opinion upon a Bill not yet passed into law, but they may be called upon to assist the House by giving their opinion on *abstract* questions of existing law, that is to say, on questions not likely to come before them judicially (see *R. v. M'Naughton*, 1843, 4 St. Tri. N. S. 847, 847 *n.*). In the *Wensleydale Peerage* case, 1856, 8 St. Tri. N. S. 479, the House refused to consult the judges on the question of life peerages, on the ground that the question was one of the *lex et consuetudo Parliamenti*.

Executive Control of Parliament.—The general conduct of the MINISTRY is subject to parliamentary criticism and control. Members of Parliament may individually question ministers as to the affairs of their departments; and collectively each House may order accounts and papers relating to trade, finance, and matters of local and general interest to be produced and printed, or, if they relate to the prerogative, may obtain them by address to the Crown; in many cases papers are presented to Parliament by command of the Crown. Either House may appoint Committees of Inquiry. Such committees are now empowered to examine witnesses on oath (21 & 22 Vict. c. 70; 34 & 35 Vict. c. 83); and it has recently been

made a misdemeanour to attempt to intimidate witnesses appearing before them (55 & 56 Vict. c. 64). The two Houses of Parliament do not possess any executive powers, but may embody their views in resolutions. Adverse resolutions of the House of Commons may bring about the resignation of the Ministry or a dissolution, as ministers cannot continue in office against the will of the House of Commons (see CABINET; EXECUTIVE GOVERNMENT). The judges and certain other officers are removable from office by the Crown upon an address from both Houses; before any such address is moved, it is the practice to appoint a committee to inquire and report to the House.

Adjournment, Prorogation, Dissolution.—Each House may adjourn to a future day. The Crown may bring the session to an end by a prorogation, which has the effect of quashing all proceedings, except impeachments and appeals before the House of Lords. Parliament is prorogued by the sovereign in person in the House of Lords, or by commission; it may also be prorogued by proclamation from the day for which it was summoned, or to which it had been previously prorogued (30 & 31 Vict. c. 81). When Parliament stands prorogued, or both Houses stand adjourned for more than fourteen days, the Crown may by proclamation direct it to meet within not less than six days of the proclamation, and may in the same manner prorogue it for a further period (37 Geo. III. c. 127; 33 & 34 Vict. c. 81). By 6 Anne, c. 7, Parliament, if prorogued or adjourned, at the demise of the Crown is at once to sit and act. When the supplementary militia is embodied, the Crown is required by statute to issue a proclamation for the meeting of Parliament, if prorogued, within ten days.

Parliament may be dissolved by the sovereign in person, or by commission, if Parliament is sitting; and if it be not sitting, by proclamation under the Great Seal. It is now usual to prorogue Parliament, and then by the same proclamation to dissolve the old Parliament and summon a new one. By the Septennial Act, 1 Geo. I. c. 38, Parliament expires after seven years, if not sooner dissolved. The duration of a Parliament is not now affected by the demise of the Crown. 30 & 31 Vict. c. 102, s. 51; 37 Geo. III. c. 127, however, provides that in case of the demise of the Crown after a dissolution before the day appointed for the assembly of the new Parliament, the old Parliament is to meet again and sit for six months, subject to prorogation or dissolution. With regard to this prerogative of dissolution, it is usual for the Crown to allow Ministers, if defeated in the House of Commons, to appeal to the constituencies by a dissolution.

[*Authorities.*—May, *Parliamentary Practice*, 10th ed.; Anson, *Law and Custom of the Constitution*.]

Parliamentary Agent.—All private bills and petitions to Parliament are required to be solicited by a parliamentary agent, who is personally responsible to each House for the observance of the rules and practice of the House, and also for the payment of all fees and charges payable under the Standing Orders.

No person may act as a parliamentary agent until he has subscribed a declaration, engaging to observe and obey the rules, regulations, orders, and practice of Parliament, and also to pay from time to time, when demanded, all fees and charges due in respect of any petition or bill in which he appears, and has entered into a bond in a penalty of £500,

with two sureties of £250 each, to observe such declaration; the declaration and bond to be in such form as the Speaker from time to time directs: and no person may be registered as a parliamentary agent unless he is actually employed in promoting or opposing some pending bill or petition. A person not being a solicitor or writer to the signet, wishing to qualify himself, for the first time, to act as a parliamentary agent, must make an application: writing to the Clerk of the Private Bill Office, and produce a certificate of respectability from a member of Parliament, justice of the peace, barrister-at-law, or solicitor. Members and officers of either House are disqualified from acting as parliamentary agents.

Every parliamentary agent conducting proceedings before Parliament is personally responsible to each House and to the Chairman of Committees in the House of Lords and the Speaker in the House of Commons, for the observance of the rules, orders, and practice of Parliament, as well as of any rules which may from time to time be made by the Chairman of Committees or Speaker, and also for the fees and charges due and payable under the Standing Orders. Any parliamentary agent who wilfully acts in violation of such rules, orders, or practice, or who wilfully misconducts himself in prosecuting any proceedings before Parliament, is liable to be suspended or prohibited from practising as a parliamentary agent, at the pleasure of the Chairman of Committees or Speaker; and if any such agent is reported as a defaulter in the payment of fees or charges, he may not enter himself as a parliamentary agent in any future proceedings until permitted to do so by direction of the Chairman of Committees or Speaker.

No person who has been prohibited from practising as a parliamentary agent, or who has been struck off the roll of solicitors, or disbarred by any of the Inns of Court, may be registered as a parliamentary agent without the express authority of the Chairman of Committees or Speaker.

Where books or documents are intrusted to a parliamentary agent for the purpose of conducting proceedings in Parliament, he has a lien on such books and documents for the amount due to him for his costs, charges, and disbursements (*Ridgway v. Lees*, 1856, 25 L. J. Ch. 584).

[*Authority*.—May, *Parliamentary Practice*, pp. 691–693, 818, to which work the writer of this article is indebted for reference to the regulation concerning parliamentary agents.]

Parliamentary Committees.—NOTE. *In this article the Standing Orders of the House of Lords are cited as L. S. O., and those of the House of Commons as C. S. O.*—There are four classes of parliamentary committees, namely: (1) Committees of the whole House; (2) Standing or Sessional Committees; (3) Select Committees; and (4) Joint Committees.

Committees of the whole House.—A committee of the whole house is really the House of Lords or House of Commons itself, sitting in committee for the more convenient consideration of business of certain kinds and presided over by a chairman appointed by the House at the commencement of every session, instead of by the Lord Chancellor, or by the Speaker as the case may be. In the House of Lords a committee of the whole house is appointed by an order “that the House be put into committee” and in the House of Commons, by a resolution “that the House will immediately (or on a future day) resolve itself into a committee of the whole house.” The proceedings of such a committee are, generally speaking, conducted in the same manner as when the House is sitting

the chief difference being, that in committee a member is entitled to speak more than once on the same question.

It is provided by the Standing Orders of the House of Commons, in which all money bills must be originated, that the House will not proceed on any petition, motion, or bill for granting any money, or for releasing or compounding any sum of money owing, to the Crown, or on any motion for an Address to the Crown, praying that any money may be issued, or that any expense may be incurred, except in a committee of the whole house (C. S. O. 58-60); and that if any motion is made for any aid, grant, or charge on the public revenue, whether payable out of the Consolidated Fund or out of moneys to be provided by Parliament, or for any charge upon the people, the consideration and debate thereof shall be adjourned till such future day as the House shall think fit to appoint, and then it shall be referred to a committee of the whole house before any resolution or vote of the House is passed thereon (C. S. O. 62).

The Committee of Supply and Committee of Ways and Means are committees of the whole house, appointed by the House of Commons at the commencement of every session, as soon as the Address in answer to the Queen's Speech has been agreed to, for the purpose of considering the estimates and financial proposals for the year submitted by the Chancellor of the Exchequer (C. S. O. 54). The committees are fixed for Mondays, Wednesdays, and Fridays, and may also be appointed for any other day on which the House meets, and they continue their sittings until the supplies have been voted, and the financial arrangements have been completed for the session (C. S. O. 55). The functions of the Committee of Supply are to consider the estimates, and decide what supplies shall be granted for the army, navy, and civil services respectively, for the current year. The committee may either vote or refuse or reduce a proposed grant; but, in accordance with the constitutional principle that Parliament does not grant money except when it is demanded by the Crown, the committee may not increase the amount of a grant beyond the sum stated in the estimates. The Committee of Ways and Means from time to time votes the payment from the Consolidated Fund of sums on account of the supplies voted by the Committee of Supply; and also considers the Budget, and decides what taxation shall be imposed for the year in order to meet the public expenditure. The committee has no power to increase the amount of a proposed tax, except on the motion of a Minister of the Crown.

It is not within the scope of the functions of the Committee of Supply to consider any questions of exceptional expenditure not included in the estimates; nor within the scope of the functions of the Committee of Ways and Means to consider any questions with regard to permanent taxation; but, in accordance with the provisions of the Standing Orders 58-62 (cited above), all such questions must be referred to and considered in a committee of the whole house, before any resolutions in respect thereof may be submitted to the House.

The votes of the Committee of Ways and Means sanctioning payments on account are embodied in Consolidation Fund Acts passed from time to time during the session; and its resolutions with respect to taxation, and the grants voted in Committee of Supply, are given effect to by the Finance Act and Appropriation Act respectively, which are passed at the end of the session. See further, as to the proceedings in Committee of Supply and of Ways and Means, May, *Parliamentary Practice*, pp. 569-593.

It is usual, in both Houses, to refer every public bill, after the second reading, to a committee of the whole house, in which the details of

the bill are considered section by section, and clause by clause. Amendments may be introduced in committee, and any clauses added, negatived, and others substituted, provided the amendments and additions are not inconsistent with the principle of, and are relevant to, the bill as read a second time. Sometimes a public bill is referred to a select committee, either before or after it has been considered by a committee of the whole house; and, after having been considered in committee, it is reported to the House, it may be recommitted, either to a select committee or a committee of the whole house, as often as the House thinks fit. In the House of Lords, every bill is recommitted to a standing committee after passing through committee of the whole house, unless the House otherwise orders, and it is considered in the House on the report of such standing committee (L. S. O. 45).

At the commencement of every session the House of Lords nominates a lord to act as Chairman of Committees, who takes the chair in committees of the whole house, standing committees, and select committees, unless the House otherwise orders (L. S. O. 41); and the House of Commons elects a chairman, who is known as the Chairman of Committees of Ways and Means, and who presides over the Committee of Supply and Committee of Ways and Means, and also over other committees of the whole house, for the remainder of the session (*Parliamentary Practice*, 569, 570).

A committee of the whole house has no power to adjourn its sittings. If a committee of the House of Lords desires to adjourn, the House resumes, and the chairman moves "that the House be again put into committee" on a future day. In the case of a committee of the House of Commons, the chairman is directed "to report progress, and ask leave to sit again" (*ibid.*, 368, 369). When the committee has agreed on resolutions concerning the matters referred to it, the chairman, by direction of the committee, reports such resolutions to the House, and the House considers the report, and takes such steps in relation thereto as it thinks fit. When a bill has passed through committee, it is reported to the House as amended and finally agreed to in committee.

Standing Committees.—House of Lords.—It is provided by the Standing Orders of the House of Lords, that as early as convenient in each session one or more standing committees shall be appointed, to which, or any one of which, every bill shall be recommitted after passing through committee of the whole house, unless, on motion made when the bill is reported to the Chairman of Committees, the House otherwise orders; and that the chairman shall be reported from the said standing committee, and shall be considered in the House on such report; and also that, at the commencement of each session, a "Committee of Selection," consisting of the Chairman of Committees and eight other lords to be named by the House, shall be appointed, whose duty it shall be to nominate the lords to serve on the standing committees, and to report the list or lists of lords so nominated to the House (L. S. O. 45, 46). The Committee of Selection may nominate other lords to serve on any standing committee, or discharge any lords from service thereon with their assent, and may add lords in respect of any bill committed to a standing committee, to serve during the consideration of such bill (L. S. O. 47). The quorum of a standing committee is seven (L. S. O. 48); and the procedure of such a committee is the same as that of a select committee, unless the House otherwise orders (L. S. O. 52).

A "Standing Orders Committee," consisting of forty lords, besides

the Chairman of Committees, who is *ex officio* chairman of such committee, is also appointed at the commencement of each session, to report whether in particular cases the Standing Orders ought or ought not to be dispensed with, the quorum of such committee being three, including the chairman (L. S. O. 80-83).

Standing Committees.—House of Commons.—The following standing committees are appointed at the commencement of every session in the House of Commons, namely: the Committee of Selection; the Committee of Public Accounts; the General Committee on Railway and Canal Bills; the Committee on Standing Orders; the Select Committee on Divorce Bills; and two standing committees for the consideration of bills relating to law and legal procedure, and to trade, shipping, and manufactures.

The Committee on Standing Orders consists of eleven members, nominated at the commencement of every session, to consider and report whether in any case the Standing Orders ought or ought not to be dispensed with (C. S. O. 91-97). The Committee of Selection consists of the Chairman of the Committee on Standing Orders and seven other members, nominated by the House (C. S. O. 98), and this committee nominates the members of the General Committee on Railway and Canal Bills, and may from time to time discharge members from further attendance on such general committee, and add others in their room (C. S. O. 99, 100). Printed copies of all private bills (not being railway or canal bills) must be laid before the Committee of Selection, and of all railway and canal bills before the General Committee on Railway and Canal Bills, by the promoters; and such committees may form into groups all private bills which it may be expedient to submit to such committees respectively (C. S. O. 102, 103). The Committee of Selection may, in the execution of its duties, send for persons, papers, and records (C. S. O. 115). See further, as to the proceedings of these committees, PRIVATE BILL LEGISLATION.

The Committee of Public Accounts is appointed for the examination of the accounts showing the appropriation of the sums granted by Parliament to meet the public expenditure, and consists of eleven members, of whom five form a quorum (C. S. O. 77).

The Select Committee on Divorce Bills consists of nine members, nominated at the commencement of every session, of whom three form a quorum; and is appointed to report to the House on every divorce bill (C. S. O. 189-192).

Two standing committees are appointed for the consideration of such bills relating to law and Courts of justice, and legal procedure, and to trade, shipping, manufactures, agriculture, and fishing, as may be committed to them. The procedure in such committees is the same as in select committees, unless the House otherwise orders; but strangers are admitted, except where the committee orders them to withdraw. Each committee consists of not less than sixty, nor more than eighty members, of whom twenty form a quorum, and who are nominated by the Committee of Selection, which has power from time to time to discharge them and substitute others. The committees do not sit while the House is sitting, unless by order of the House (C. S. O. 46-48). A chairman's panel of not less than four nor more than six members, of whom three form a quorum, is nominated by the Committee of Selection, and they appoint from among themselves the chairman of each standing committee, and may change the chairman from time to time (C. S. O. 49). All bills committed to one of such standing committees, when reported to the House, is proceeded with as if reported from a committee of the whole house (C. S. O. 50).

Select Committees.—A select committee consists of a certain number members of either House, appointed for the purpose of considering and reporting upon private bills, or of inquiring into and reporting upon some matter in respect of which the House desires information.

In the House of Lords, opposed local bills are referred to a committee of five lords, nominated by the House; a committee of selection, consisting of the Chairman of Committees and four other lords, being appointed to select and propose to the House the names of the five lords to form each select committee (L. S. O. 96 and 97).

In the House of Commons, the committee on every opposed railway or canal bill, or group of railway and canal bills, is composed of four members and a referee, or four members not locally or otherwise interested in the bills referred. The chairman is appointed by the General Committee on Railway and Canal Bills, and the other members by the Committee of Selection (C. S. O. 116). The committee on every opposed private bill (not being a railway, canal, or divorce bill) or group of bills, and on any bill to confirm a provisional order, is composed of a chairman, three members, and a referee, or a chairman and three members not locally or otherwise interested in the bills referred, appointed by the Committee of Selection (C. S. O. 117). Each member of the committee on an opposed private bill must, before attending or voting, declare that he is not interested in the bill; and the committee may not proceed if more than one member is absent—nor may any member absent himself unless in case of sickness—except by leave of the House (C. S. O. 118–120). Committee on private bills may decide questions by a majority of votes (C. S. O. 125).

The committee on an unopposed private bill (not being a railway, canal, or divorce bill) in the House of Commons, if the bill originated in that House, is composed of the Chairman of the Committee of Ways and Means and one of the members ordered to prepare or bring in the bill, and one other member not interested in the bill, such members to be appointed by the Committee of Selection; and if the bill is brought from the House of Lords, the committee is composed of such chairman, and two other members, one of whom must not be interested in the bill, to be appointed by the Committee of Selection (C. S. O. 137).

As to the proceedings of and in relation to committees on private bills, see PRIVATE BILL LEGISLATION.

With regard to select committees of inquiry, the Standing Orders of the House of Commons provide that no such committee, without leave of that House, which may not be moved for without notice, may consist of more than fifteen members; and that the member intending to move for the appointment of such a committee must endeavour to ascertain whether each member proposed to be named by him on the committee will give his attendance, and must give notice of the names of the members intended to be proposed by him (C. S. O. 67, 69). This provision does not apply in the case of a committee on a matter of privilege, which may be appointed, and the members thereof nominated, forthwith, without notice (May, *Parliamentary Practice*, p. 381).

A select committee may adjourn its sittings from time to time, and may sit during the sitting, and notwithstanding the adjournment, of the House, whether appointed by the Lords or Commons. Strangers are generally permitted to be present at the sittings of a select committee of the House of Commons, though not of the House of Lords, but they may at any time be excluded by the order of the committee, and are always excluded while the committee is deliberating.

Joint Committees.—A joint committee is a committee consisting of a certain number of members of each House. It is customary for the House of Lords to propose the time and place of meeting of a joint committee, whether it originated in that House or in the House of Commons (May, 398, 399).

Witnesses.—Either House has power to require the attendance of witnesses before a committee, and to arrest and commit for contempt any person refusing to attend, or to answer questions put to him. But a select committee cannot require (though it may request) the attendance of witnesses, unless it is expressly authorised to do so; and even where such authority is given, the committee has no power to order the arrest or imprisonment of any person refusing to attend and give evidence, but can only report the contempt to the House, to be dealt with as the House thinks fit. Statutory power has been given to committees of either House to examine witnesses on oath; and the giving of false evidence before such a committee subjects the witness to the penalties of perjury (21 & 22 Vict. c. 78; 34 & 35 Vict. c. 83). It is not, however, usual for select committees to examine witnesses on oath. A witness is exempt from an action for slander in respect of any evidence he may give before a parliamentary committee, such evidence being absolutely privileged (*Goffin v. Donnelly*, 1881, 6 Q. B. D. 307).

[*Authority.*—See generally, on the subject of parliamentary committees, May's *Parliamentary Practice*, to which work the writer is indebted for great assistance in writing this article.]

Parliamentary Deposits.—*Object.*—In order to secure the carrying out of works for which parliamentary powers are sought, and to check speculative applications for that purpose, as well as to afford some security to those whose property may be injuriously affected by the exercise of such powers, provision has been made for the deposit in Court by the promoters of a certain proportion of the estimated cost of such works.

“The object of the legislation relating to the deposit is to place a check upon those who bring before Parliament undertakings which prove abortive” (per Chitty, J., *In re Birmingham and Lichfield Junction Rwy. Co.*, 28 Ch. D. p. 660).

Standing Orders.—Accordingly by the Standing Orders of both Houses of Parliament, in the event of a railway bill, tramway bill, or subway bill authorising the construction of works by other than an existing railway company, tramway company, or subway company incorporated by Act of Parliament, possessed of a railway, tramway, or subway already opened for public traffic, and which has during the year last past paid dividends on its ordinary share capital, and which does not propose to raise under the bill a capital greater than its existing authorised capital, a sum not less than 5 per cent. on the amount of the estimate of expense, or in the case of substituted works, on the amount by which the expense thereof will exceed the expense of the works to be abandoned, and in the case of all bills other than railway bills, tramway bills, and subway bills, a sum not less than 4 per cent. on the amount of such estimate or of such excess, is previously to the 15th January to be deposited in Court. With regard to works in England the deposit is to be made with the Paymaster-General for and on behalf of the Supreme Court of Judicature; if in Scotland, either with such Paymaster-General or with the Queen's and Lord Treasurer's Remembrancer on behalf of the Court of Exchequer in Scotland; if in

Ireland, with the Accountant-General of the Supreme Court of Judicature in Ireland (St. Ord. H. L. No. 57; H. C. No. 58).

No deposit is required where the work is to be done by means of funds or out of money to be raised upon the credit of present surplus revenue belonging to any society or company, or under the control of directors trustees, or commissioners of any existing public work; or in case of any bill under which no private or personal pecuniary profit or advantage is to be derived (St. Ord. H. L. Nos. 58, 59; H. C. Nos. 58, 59).

Parliamentary Deposits Act, 1846.—By the Parliamentary Deposits Act, 1846 (9 & 10 Vict. c. 20), s. 2, one of the clerks in the office of the clerks in Parliament, with respect to money required to be deposited by any standing order of the House of Lords, or one of the clerks of the Private Bill Office of the House of Commons, with respect to any such money required to be deposited by any Standing Order of the House of Commons, may, on the application of the persons having the management of the undertaking (not exceeding five in number), by warrant or order under his hand direct that such sum of money shall be paid into Court.

Where the money to be deposited has been previously invested in Government securities, such securities may be directed to be transferred into Court in lieu of payment of cash (s. 3).

The money need not be the actual money of the promoters (*Scott v. Oakeley*, 1864, 33 Beav. 501).

An order can be obtained for investment of the money after it has been paid into Court (s. 4). It seems that, notwithstanding the terms of the section which prescribe Government securities as the mode of investment, the cash may be invested in securities available for the investment of cash under the control of the Court (*In re Southwold Railway Company's Bill*, 1876, 1 Ch. D. 697; and see *Ex parte St. John Baptist College, Oxford*, 1882, 22 Ch. D. 93; R. S. C. 1883, Order 22, r. 17).

Money lodged in Court under the Act will not be placed on deposit (Supreme Court Funds Rules, 1894, r. 77 (c)).

Payment out of Deposit.—On the termination of the session of Parliament in which the petition or bill shall have been introduced into Parliament, or if such petition or bill shall be rejected or finally withdrawn by some proceeding in either House of Parliament, or shall not be allowed to proceed, or if the depositors shall have failed to present a petition, or if an Act be passed authorising the works, and if in any of such cases the depositors, or the survivors or the survivor of them, or the majority of them, apply to the Court, the Court will direct payment or transfer out of Court to such persons or their nominees. The necessary evidence to be produced is the certificate of the Chairman of Committees of the House of Lords, or of the Speaker of the House of Commons, as the case may be (s. 5).

The certificate of the Deputy-Speaker has been accepted (*Ex parte Stocksbridge Railway Bill*, 1866, L. R. 2 Eq. 364); and the production of a Queen's Printer's copy of an Act was treated as sufficient evidence of its having passed (*In re Yarmouth and Ventnor Rwy. Co.*, 1871, W. N. 236).

Where a deposit has been paid into Court in respect of several undertakings comprised in one bill, and the bill is subsequently withdrawn as to some only of the undertakings, the promoters cannot on certificate of withdrawal procure at once payment out of Court of so much of the deposit as is attributable to the abandoned undertakings (*In re Aberystwith and Welch Coast Railways*, 1861, De G., F. & J. 201).

Railway, etc., Bills.—Special provision is made by the Standing Orders with regard to bills for making railways, tramways, or subways, which

provisions override the section for payment out of the deposit in the Parliamentary Deposits Act, 1846. The short effect of these provisions is as follows:—

1. In every railway bill, tramway bill, or subway bill promoted by an existing railway, tramway, or subway company possessed of a railway, tramway, or subway already opened for public traffic, and which has during the past year paid dividends on its ordinary share capital, and which does not propose to raise a capital greater than its existing share capital, a clause is to be inserted providing that on failure to complete the works within the period limited by the Act, the company shall be liable to a penalty of £50 a day until the line is completed and opened for public traffic, or until the sum received in respect of such penalty shall amount to 5 per cent. on the estimated cost of the works. Such penalty may be applied for by any landowner or other person claiming to be compensated or interested. The amount of the penalty is to be paid into Court (St. Ord. H. L. No. 114; H. C. 158 (A)).

In the case of a railway bill or tramway bill, where general compulsory powers are not granted on the ground that the direct object is to serve private interests, a clause is to be inserted that no penalty will accrue if it appears by a certificate of the Board of Trade that the company was prevented, by the want of such compulsory powers, from making the railway or tramway without incurring unreasonable delay, inconvenience, or expense.

And if a deposit has been made, a clause that the deposit may be released on production of a similar certificate (St. Ord. H. L. No. 117).

2. Where a railway bill, tramway bill, or subway bill is promoted by an existing railway, tramway, or subway company not possessed of a railway, tramway, or subway already opened for traffic, or which has not during the past year paid dividends on its ordinary share capital, or where the capital to be raised under the bill is greater than the existing authorised capital, or by persons not already incorporated, a clause is to be inserted to the effect that the deposit money shall not be paid or transferred to the depositors, unless the company shall, previously to expiration of the period limited by the Act for completion, open the line for public traffic. The clause may also contain a proviso that, if part of the line be opened for traffic, a proportionate part of the deposit may be released on the certificate of the Board of Trade (St. Ord. H. L. No. 115; H. C. No. 158 (B)).

3. In every railway bill, tramway bill, or subway bill, whereby the construction of any new line is authorised, or the time for completing any line already authorised is extended, a clause is to be inserted to the following effect, namely, that on non-completion the deposit or money recovered by way of penalty shall be applicable, after due notice in the *Gazette*, towards compensating any landowners or other persons whose property may have been interfered with or otherwise rendered less valuable by the commencement, construction, or abandonment of the authorised works, or who may have been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company, and also (in case of a tramway) in compensating all road authorities for the expense incurred by them in taking up any tramway, or materials connected therewith, placed by the company in or on any road vested in or maintainable by such road authorities, and in making good all damage caused to such roads by the construction or abandonment of such tramway, and shall be distributed in satisfaction of such compensation as to the Court may seem fit. If no such compensation shall be payable, then the deposit or penalty, or so much thereof as shall not be required, shall, if a receiver has been appointed, or the company is insolvent, and has been ordered to be wound up, or the undertaking has been abandoned, be paid or transferred to such receiver, or to the liquidator or liquidators of the company, or be applied in the discretion of the Court as part of the assets of the company for the benefit of the creditors thereof, and, subject to such application, shall be repaid or retransferred to the depositors. Until repayment of the deposit fund, or until it becomes applicable under the above provisions, the interest or dividends accruing thereon are to be paid to the depositors (St. Ord. H. L. No. 116; H. C. No. 158 (C)).

Originally the Standing Orders contained a provision that, subject to the claims of landowners, etc., the deposit should be forfeited to the Crown, or otherwise, in the discretion of the Court, in case of insolvency or appointment of a receiver be applied for the benefit of creditors. The clause has been altered to its present form in consequence of the provisions of the Parliamentary Deposits and Bonds Act, 1892 (55 & 56 Vict. c. 27). By

that statute it is enacted that, where in pursuance of any general or special Act, or of any rules made thereunder, moneys or securities have been deposited with or are standing in the name of the Paymaster-General to secure the completion by any company of any undertaking authorised by Parliament, or by any certificate issued under the authority of an Act of Parliament, and the undertaking has not been completed within the time limited, the Court may, notwithstanding anything in such general or special Act or rules, order the deposit to be applied in compensating landowners etc., and road authorities. Subject to payment of such compensation, and notwithstanding any provision as to forfeiture to the Crown, the deposit may be applied for the benefit of creditors, and, subject to such application, may be paid or transferred to the depositors (s. 1 (1) (2) (3)).

It was formerly held that, where the deposit became payable to the creditors of the company, any *bonâ fide* creditors were entitled, a distinction being drawn between "meritorious" and "non-meritorious" creditors (*In re Bradford Tramways Co.*, 1876, 4 Ch. D. 18; *In re Lowestoft, Yarmouth and Southwold Tramways Co.*, 1877, 6 Ch. D. 484; *In re Birmingham and Lichfield Junction Rwy. Co.*, 1885, 28 Ch. D. 652). The effect, however, of the Parliamentary Deposits and Bonds Act, 1892, is to do away with this distinction, and all creditors, as well non-meritorious as meritorious, come in before the depositors (*In re Manchester, Middleton, and District Tramway Co.*, [1893] 2 Ch. 638, though in that case, on the ground that the company was a mere paper company, that is a company which never had any existence beyond statutory incorporation, it was held that none of the claimants were entitled to rank as creditors). See also *In re Hull, Barnsley, and West Riding Junction Rwy. Co.*, 1893, W. N. 83; *Ex parte Bradford and District Tramways Co.*, [1893] 3 Ch. 463. There is no power to order payment out of the deposit of the general costs of a liquidator, where the company has been ordered to be wound up, though the costs of proceedings taken with reference to the application of the deposit may be allowed out of it (*In re Colchester Tramways Co.*, [1893] 1 Ch. 309).

The word "creditors" in subsec. 2 of sec. 1 of the Act of 1892 is not limited to the creditors of the particular undertaking which has been abandoned, but includes the general creditors of the company (*In re Bradford and District Tramways Co.*, [1893] 3 Ch. 463). That subsection has no application to a case where the company is not insolvent, nor is being wound up, and where there is no receivership, and there has been no abandonment. Therefore, in the case of a large railway company carrying on its undertaking as a going concern, where it had permitted the statutory time for completion of a portion of its line to expire, no notices, except to landowners, were required to be given (*In re Hull, Barnsley, and West Riding Junction Rwy. Co.*, 1893, W. N. 83).

There is no jurisdiction under sec. 1 to make an order for repayment of the deposit, until the time limited for the completion of the company's undertaking has expired, even though the company's compulsory power for the purchase of land have expired, and they have raised no capital, and have taken no steps to acquire land, and have passed a resolution to abandon the undertaking (*Ex parte Chambers*, [1893] 1 Ch. 47).

Compensation.—A landowner can, as a rule, only claim compensation on account of acts done or omitted to be done by the company under their statutory powers, and not on account of any collateral obligation entered into by the company. But where a company has entered into a collateral obligation of such a nature that the breach of the obligation is necessarily involved in the undertaking and undistinguishable from it, such as

covenant to build a station, the breach of such obligation may be taken into account in assessing the diminution in value of the land (*In re Ruthin, etc., Railway Act*, 1886, 32 Ch. D. 438).

The words "commencement, construction, or abandonment" are to be read disjunctively. The measure of injury must be determined by comparing the value of the estate immediately before with its value immediately after the abandonment (*In re Potteries, Shrewsbury, and North Wales Rwy. Co.*, 1883, 25 Ch. D. 251). Mortgagees of landowners can claim (S. C.).

"In consequence of the compulsory powers" means "in consequence of the exercise of the compulsory powers." Mere service of a notice to treat was held not to be an exercise of such powers (*In re Uxbridge and Rickmansworth Rwy. Co.*, 1890, 43 Ch. D. 536).

Practice.—The Parliamentary Deposits Act, 1846, contemplated applications to the Court under the Act being made by petition. Under the present practice they are required to be made by summons at chambers (R. S. C., 1883, Order 55, r. 2 (6)).

The deposit may be ordered to be paid to bankers of the depositors (*In re Warwick and Leamington Rwy. Co.*, 1842, 13 Sim. 31).

Payment may be ordered to the secretary of the company on the summons being sealed with the seal of the company (*Ex parte London, Chatham, and Dover Rwy. Co.*, 1860, 8 W. R. 636; *In re Dartmouth and Torbay Rwy. Co.*, 1861, 9 W. R. 609). And no affidavit was required verifying the signature of a petition by the depositors, where such signature was attested by a solicitor (*Ex parte Brompton Waterworks Co.*, 1860, 8 W. R. 636 n.).

Abandonment of Railways.—The statutory provisions applicable to the abandonment and winding up of railways will be found in article RAILWAY (10. *Abandonment and Winding up*).

See sec. 5 of the Abandonment of Railways Act, 1869, and *In re Brompton and Longtown Rwy. Co.*, 1870, L. R. 10 Eq. 613; *In re Barry Rwy. Co.*, 1876, 4 Ch. D. 315; *In re Kensington Station Co.*, 1875, L. R. 20 Eq. 197; and note the following additional points. The Court may order the fund, or so much as is required, to be applied as assets of the company, to be paid, transferred, or delivered out to the official liquidator, and unless the Court is satisfied that the same or any part thereof is not required to be applied as assets, shall not order the same to be paid out to any other person (Abandonment of Railways Act, 1869, 32 & 33 Vict. c. 114, s. 6 (1)).

Where a railway had been abandoned, the costs of a petition by the depositor for transfer of the deposit out of Court to him were ordered to be paid out of the general assets of the company (*In re Laugharne Rwy. Co.*, 1871, L. R. 12 Eq. 454).

By sec. 7 the rights of parties interested in any part of the deposit not applied in payment of debts and liabilities of the company or required for that purpose are saved.

The Abandonment Acts of 1850 and 1869, coupled with sec. 31 of the Railway Companies Act, 1867, apply only to railway companies incorporated prior to the session in which the Act of 1867 was passed, and therefore no warrant of abandonment can be granted or an order to wind up obtained in the case of a railway company incorporated since 1867, in the absence of special provisions in a private Act for abandonment (*In re Birmingham and Lichfield Junction Rwy. Co.*, 1881, 18 Ch. D. 155; 1885, 28 Ch. D. 652; *In re Uxbridge and Rickmansworth Rwy. Co.*, 1890, 43 Ch. D.

536). In the last-named case the Court held that words in the special Act of the company, which enacted that the "company shall forthwith proceed to wind up their affairs," amounted to an order to wind up the company.

Railways Construction Facilities Act, 1864.—By the Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), it is provided that, after the certificate of the Board of Trade is ready to be issued, the promoters, unless they are a previously existing company possessed of a railway open for public traffic, shall pay into Court as a deposit a sum of money not less than 8 per cent. on the amount of the estimate of the expenses of the construction of the railway, upon a warrant of the Board of Trade, or may bring into Court an equivalent sum of bank annuities or of any stocks, funds, or securities on which cash under the control of the Court may be invested (ss. 34, 35, 36).

The money may be invested (s. 38).

The Court may, on application of the depositors, order the fund to be paid to them or their nominees in any of the following events, viz. :—

(1) If within the time which in the certificate to be granted under the Act is prescribed, and if none is prescribed, then within five years from the commencement of the operation of the certificate, the company complete and open the railway for public traffic.

(2) If within the same time the company prove to the satisfaction of the Board of Trade that one-half of their authorised nominal capital is paid up, and that they have expended a like amount for the purposes of the certificate.

(3) If at any time after the issuing of the certificate they execute and deliver to the Solicitor of the Treasury a bond with an approved surety or approved sureties in twice the amount of the money required to be deposited, conditioned for payment to Her Majesty of the amount required to be expended if the railway is not completed within the time limited, or proof given respecting the capital and expenditure (s. 40).

If the line is not completed or proof of capital and expenditure given, or a bond delivered, within the time named in the certificate, or if none so named, then within five years from the commencement of the operation of the certificate, the deposit shall be forfeited to Her Majesty (s. 41).

Interest is payable to the depositors on the fund so long as it remains in Court (s. 43).

The provisions of the Parliamentary Deposits and Bonds Act, 1892, would apply to any deposit under the Railways Construction Facilities Act, 1864.

The Tramways Act, 1870.—Under the Tramways Act, 1870 (33 & 34 Vict. c. 71), before a provisional order of the Board of Trade authorising the construction of a tramway is delivered by the Board, the promoters, unless they are a local authority, must within the prescribed time and in the prescribed manner, and subject to the prescribed conditions as to interest, repayment, or forfeiture, pay as a deposit into the prescribed bank the sum of money prescribed, which must not be less than 4 per cent. on the amount of the estimate of the expense of construction, or deposit in such bank any security of the prescribed nature the then value of which is not less than such sum of money (s. 12).

The Board of Trade may from time to time make, and when made, may rescind, annul, or add to, rules with respect to the payment of money or lodgment of securities by way of deposits, the repayment and forfeiture of the same, the investment of the same, the amount and payment of interest or dividends from time to time accruing due on such deposits (s. 64 (2)).

Board of Trade Rules, 1892.—By the Board of Trade Rules, 1892, it is accordingly provided that the promoters (unless they are a local authority) shall, if they are not possessed of a tramway already open for public traffic which has during the year last past paid dividends on their ordinary share capital, pay into Court as a deposit a sum of money not less than 5 per cent. on the amount of the estimate of the expense of construction of the tramway. The amount will be paid on the warrant of the Board of Trade.

In lieu of payment, an equivalent amount of bank annuities, or of any stocks, funds, or securities on which cash under the control of the Court may be invested, or of exchequer bills, may be brought into Court.

The Court may order investment of a cash deposit (r. 20).

The rules contain provisions similar to those in the Standing Orders of the two Houses of Parliament stated *supra*—(1) for payment into Court of a penalty of £50 a day in case of non-completion within the time in the provisional order prescribed, or within two years from the passing of the Act confirming the order, by promoters possessed of a tramway opened for public traffic; (2) for application of the deposit in compensating road authorities, and in case of appointment of a receiver or insolvency, in payment of creditors; and, subject to such application, for repayment to the depositors (rr. 21, 22).

The rules as now framed are in accordance with the provisions of the Parliamentary Deposits and Bonds Act, 1892, and the observations on that Act and the cases cited *supra* apply as well to deposits under these rules as to deposits under the Standing Orders. Under the former rules, it was held that the intention was (1) that the promoters of the company should not by any subterfuge or device get back the deposit, either directly or indirectly, if the tramway were not completed; (2) that on an application for payment of creditors, the creditors only were to be considered, and not the shareholders; and (3) that the only creditors to be considered were meritorious creditors coming with a *bonâ fide* case. As has already been stated, the Act of 1892 has given effect to the new policy of the Legislature, has abolished the forfeiture of the deposit to the Crown, and has put an end to the distinction between meritorious and non-meritorious creditors.

The deposit will be paid out to the depositors, if within the prescribed time or within two years from the passing of the Act confirming the provisional order the tramway is open for public traffic. If a portion of the line is open, a proportionate part of the deposit may be released (r. 23).

Interest will be paid to the depositors on the fund while in Court (r. 24).

If either House of Parliament refuse to confirm a provisional order or any part thereof, or if the same is withdrawn before confirmation, the Court, on production of a certificate of the Board of Trade, may order the deposit to be paid out to the depositors (r. 24).

Any application under the rules is to be made in a summary way by summons at chambers (r. 24).

Life Assurance Companies (see, too, LIFE INSURANCE, vol. vii. at p. 444).—By the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61)—

Every insurance company established after 9th August 1870 within the United Kingdom, or established or to be established out of the United Kingdom, which shall after that date carry on life assurance business in England, must deposit in Court in the Chancery Division the sum of £20,000, and until such deposit is made the certificate of

incorporation of the company will not be issued. The deposit is to be returned to the company so soon as its life assurance fund accumulated out of premiums amounts to £40,000 (s. 3).

By the Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41)—

The deposit may be made by the subscribers of the memorandum of association of the proposed company, or any of them, in the name of the company, and such deposit upon the incorporation of the company is to be deemed to be part of the assets of the company; and, until returned to the company, is to be deemed to form part of the life assurance fund of the company (s. 1).

The life assurance fund required by the Act of 1870 to have been accumulated prior to the return of the deposit may, in the case of a foreign life assurance company, consist of accumulations already existing abroad and arising from the original business of the company (*In re Colonial Mutual Life Assurance Society*, 1882, 21 Ch. D. 837).

Where a company had made the deposit, and subsequently amalgamated with another company, and application was made for payment out, on the ground that, though the depositing company had not made any accumulation, yet the company with which it was amalgamated had a life assurance fund far in excess of £40,000, the application was refused. The meaning of the Act is that the company which made the deposit shall have carried on its business so prosperously as to have accumulated out of the profits of that business £40,000 (*Ex parte Scottish Economic Life Assurance Society*, 1890, 45 Ch. D. 220).

In pursuance of the Act of 1872, rules have been made by the Board of Trade, which provide that the deposit shall be made under the warrant of the Board; and that in lieu of payment of cash an equivalent sum of bank annuities, or of stocks, funds, or securities on which cash under the control of the Court may be invested, or of exchequer bills, may be brought into Court (Board of Trade Rules, 28th August 1872, r. 2).

The money may be invested in such securities as the depositors desire and the Court thinks fit (r. 4); and the dividends may be ordered to be paid to the depositors (r. 7).

As soon as the life assurance fund accumulated out of premiums paid to the company is proved to amount to £40,000, the deposit may be paid to the depositors, or as they direct (r. 6).

Any application under the rules is made by petition (r. 9).

Under rule 4 an investment in a security not clearly within the provisions for investment of cash under the control of the Court was sanctioned (*In re Blue Ribbon Life, etc., Assurance Co.*, 1889, W. N. 176).

Though the Act speaks of the fund being returned to the company, the terms of rule 6 enable the Court to order it to be paid to the depositors (*In re Colonial Mutual Life Assurance Society*, 1882, 21 Ch. D. 837).

The petition should be signed by the depositors (*In re Scottish Life Assurance Co.*, 1887, W. N. 64).

[*Authorities*.—Board of Trade Rules, 1892, under the Tramways Act, 1870; Board of Trade Rules under Life Assurance Acts, 1870 to 1872; Buckley on *The Companies Acts*, 7th ed., 1897, pp. 714–738; Browne and Theobald on *The Law of Railways*, 2nd ed., 1888; Clifford's *History of Private Bill Legislation*, 1887; Daniell's *Chancery Practice*, 6th ed., 1884, pp. 2130–2137, 2171–2173, 2255–2269; Hodges on *Railways*, 7th ed., 1888; Seton's *Judgments and Orders*, 6th ed., 1893, pp. 2053–2063; Standing Orders, 1898; Sutton on *The Tramways Acts*, 2nd ed., 1883.

Parochial Electors.—The parochial electors of a rural parish are “the persons registered in such portion either of the local government register of electors or of the parliamentary register of electors as relates to the parish” (L. G. Act, 1894 (56 & 57 Vict. c. 73), s. 2 (1)). Thus many persons are parochial electors who do not contribute to the rates of the parish at all, such as owners who reside out of the parish, lodgers, and persons enjoying the service franchise. The parish meeting (*q.v.*) is therefore a much larger body than the former vestry, which comprised only persons rated to the relief of the poor and those whose rates were paid for them by the owner of the property under the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41). Peers of the realm, soldiers, sailors, policemen, officers and servants of any county or district council, and women, whether married or single, may all be parochial electors. The married women must, however, possess a separate qualification; for a husband and wife cannot both be qualified in respect of the same property (L. G. Act, 1894, s. 43). But a married woman is not qualified to be a parochial elector merely because she owns property within the parish; for the provision of sec. 43 of the Local Government Act, 1894, in favour of married women does not create a new qualification (*Drax v. Ffooks*, [1896] 1 Q. B. 238). So as to freemen; the fact of a person being on the list of freemen for a parliamentary borough does not entitle him to have his name entered in the parochial electors’ list for the parish within the borough, even though he may reside within the parish; for the list of freemen is a separate list, not arranged under the heading of any parish, and is not therefore a “portion of the parliamentary register of electors relating to the parish” within the meaning of sec. 2, subsec. 1 of the Local Government Act, 1894 (*Hart v. Beard*, [1896] 1 Q. B. 54).

The local government register of electors and the parliamentary register of electors, so far as they relate to a parish (and, where the parish is in a parliamentary borough, such portion also of the parliamentary register of electors for the county as contains the names of persons registered in respect of the ownership of any property in the parish), together form “the register of the parochial electors of the parish.” No person whose name is not in that register will be entitled to attend a parish meeting or vote as a parochial elector, and any person whose name is in that register will be entitled to attend a parish meeting and vote as a parochial elector, unless prohibited from voting by the L. G. Act, 1894, or any other Act of Parliament (*e.g.* for bribery). The lists and register of electors in any parish should be framed in parts for wards of urban districts and parishes so that they may be conveniently used as lists for polling at an election for any such ward. A person, if duly qualified, may be registered in more than one register of parochial electors (L. G. Act, 1894, s. 44).

Parochial Relief.—See POOR LAW.

Parol.—This term signifies both “oral” and “by writing not under seal.”

Agreements.—See CONTRACT; SPECIFIC PERFORMANCE.

Arrest.—See ARREST, vol. i. p. 328.

Evidence.—See EVIDENCE; TRIAL; WITNESS.

Parole.—Parole, in the usages of war, is the pledge on honour given by prisoners that on release they will observe certain conditions not to serve against the capturing government,—usually the war then existing. The engagement is understood to be a voluntary one on both sides, the being no recognised obligation in international law as to prisoners being released. Moreover, the condition of not serving would be held as observed although the released person performed military services such as recruiting or drilling troops for his own country, or fighting against other belligerents than that to which the parole has been given.

A prisoner must not enter into parole on any terms which his country has declared illegal; and if he does, or the terms are otherwise not approved by his country, he may be sent back as a prisoner. A country would not recognise an undertaking never to serve against the captor; and the English Government does not recognise the parole of soldiers unless given through a commissioned officer, or of an inferior officer when a superior officer is present. Violation of parole involves loss of the rights accorded to prisoners and may be punished with death.

[*Authorities.*—Wheaton, *International Law*, 8th ed., p. 343; Hallac, *International Law*, vol. ii. p. 350.]

Parol Variation.—1. *Contemporaneous Variation.*—The general rule that evidence of contemporaneous parol agreement cannot be adduced to vary a written contract is stated under EVIDENCE (vol. v. p. 93), and the exceptions to the rule are there collected (see also CUSTOM; and MISTAKE). The rule is specially important in regard to bills of exchange. Thus no parol evidence can be adduced to contradict a bill either as to the time of payment (*Woodbridge v. Spooner*, 1819, 3 Barn. & Ald. 233; *Drain v. Harvey*, 1855, 17 C. B. 257), or the amount (*Besant v. Cross*, 1851, 10 C. B. 89), or to show that the bill was intended to secure payment of the interest on it (*Hill v. Wilson*, 1873, L. R. 8 Ch. 888). But it may be adduced to show that a party is liable only as surety for another (*Macdonald v. Whitfield*, 1883, 8 App. Cas. 733; and see ACCOMMODATION BILL, vol. i. p. 65).

2. *Subsequent Parol Rescission.*—The question how far evidence of subsequent parol variation of a contract in writing may be adduced does not appear as yet to have been completely determined.

There is no doubt that a written contract may be wholly waived or abandoned by parol (*Price v. Dyer*, 1810, 17 Ves. 356; 11 R. R. 102; see also *Nobel v. Ward*, 1867, L. R. 2 Ex. 135). This rule extends, since the Judicature Act, to contracts under seal (*Steeds v. Steeds*, 1889, 22 Q. B. 1537). An agreement to rescind a written contract may be inferred from the conduct of the parties (see ACQUIESCENCE, vol. i. pp. 93, 94).

Where a parol agreement is made varying a written contract, and, by reason of the Statute of Frauds, the agreement cannot be sued upon, it will not be inferred that the parties intended to rescind the written contract merely from the fact that they made the subsequent ineffective agreement (*Nobel v. Ward*, *supra*; see also ACCORD AND SATISFACTION). And, of course, negotiations to vary a written agreement do not, of themselves rescind it (*Robinson v. Page*, 1826, 3 Russ. 114; 27 R. R. 26).

3. *Subsequent Parol Variation.*—In the case of *Goss v. Lord Nugent* (1833, 5 Barn. & Adol. 58), Denman, L.C.J., said that at the common law parties to a contract in writing may at any time, by a new contract, not in writing, either waive, dissolve, or annul the written agreement, or add to, qualify, or vary it. The actual decision in the case was that

vendor of land, who was unable to make a title according to the written contract, could not sue upon the contract verbally varied by a subsequent agreement as to the title to be made. It is well established that where there has been part performance of a subsequent parol variation of the written contract, the contract as varied may be enforced (see below, 4). And where no question of the Statute of Frauds arises, a written contract may be varied by the tacit conduct of the parties; for instance, articles of partnership (Lindley on *Partnership*, 5th ed., p. 408; *Const v. Harris*, 1823, Turn. & R. 496, 24 R. R. 108). As to the variation of a contract by an agreement to postpone the date of performance, see and cp. *Leather Cloth Co. v. Hieronimus*, 1875, L. R. 10 Q. B. 140; *Plevins v. Downing*, 1876, 1 C. P. D. 220; and *Hickman v. Haines*, 1875, L. R. 10 C. P. 598, cited *infra*. On the other hand, it is often broadly stated that the "law prohibits generally, if not universally, the introduction of parol evidence to add to a written agreement, whether respecting or not respecting land, or to vary it" (per Knight Bruce, L.J., in *Martin v. Pycroft*, 1852, 2 De G., M. & G. 785,—a case of concurrent variation), and that a subsequent parol variation, unless a complete abandonment of the written contract, or unless acted upon so as to make the performance of the original contract unfair, is not a bar to specific performance of the original contract (per Grant, M. R., *Price v. Dyer*, *supra*; see also *Nobel v. Ward* and *Hickman v. Haines*, *supra*). The rule, excluding evidence of a parol variation, is stated by Sir Frederick Pollock (*Contracts*, 6th ed., p. 235) as extending to subsequent variations. It is nevertheless submitted, upon the authorities first cited, that the correct rule was that laid down by Denman, L.C.J. (*supra*). The *dicta* to the contrary all occur either in cases of specific performance, or in cases where the Statute of Frauds was in point. Possibly the true rule may be that a subsequent parol variation may be proved and enforced by a plaintiff (wherever the Statute of Frauds is not a bar; see below, 4), and by a defendant, by way of defence (in all cases), wherever there is, in effect, a rescission of the old agreement and substitution of a new one (see *Hickman v. Haines* and *Nobel v. Ward*, *supra*).

4. *Specific Performance*—*Statute of Frauds*.—In regard to specific performance, the effect of a parol variation depends upon the circumstances of the case. It is clear that where performance without the variation would be unjust, a Court of equity will stand neutral, unless the plaintiff consents, if so required by the defendant (*Robinson v. Page*, 1826, 3 Russ. 114; 27 R. R. 26), to perform the real and final agreement of the parties (*Smith v. Wheatcroft*, 1878, 9 Ch. D. 223; *Price v. Dyer* and *Martin v. Pycroft*, *supra*; Fry on *Specific Performance*, 3rd ed., p. 372). Where the contract is within the Statute of Frauds, and there is no part performance to remove the difficulty (*Olley v. Fisher*, 1886, 34 Ch. D. 367), the statute will prevent a plaintiff succeeding on the agreement as varied, and the variation may prevent his succeeding on the contract as written (*Townshend v. Stangroom*, 1801, 6 Ves. 328; 5 R. R. 312; *Higginson v. Clowes*, 1808, 15 Ves. 516; 10 R. R. 112; *Martin v. Pycroft*, *supra*). See generally the notes to *Woolham v. Hearn* (1802, 7 Ves. 211; 6 R. R. 113) in White and Tudor's *L. C. Eq.* The statute does not prevent a defendant setting up a parol rescission or variation (*Sanderson v. Graves*, 1875, L. R. 10 Ex., p. 34), since it is only a weapon of defence (*Jervis v. Berridge*, 1873, L. R. 8 Ch. 351).

5. *Condition barring Parol Variation*.—A condition is not infrequently inserted in written contracts prohibiting the variation of the terms except by a writing, or by some other specified mode; for instance, with regard to extra work in a builder's contract. Such a condition is effective both at

law (*Russel v. Sada Bandeira*, 1862, 13 C. B. N. S. 149) and in equity (*Kirk v. Bromley Union*, 1848, 2 Ph. 640; *Nixon v. Taff Vale Rv* 1848, 7 Hare, 136). It will, for example, prevent an employer from being bound by verbal orders given by his agent (*Sharpe v. San Paulo Rv* 1873, L. R. 8 Ch. 597; *Tharsis Co. v. MacElroy*, 1878, 3 App. Cas. 104). It seems clear that the parties to the contract may waive the condition of a new parol agreement (see above, 3; *Franklin v. Darke*, 1861, 3 F. & F. 6; *Wallis v. Robinson*, 1862, 3 F. & F. 307; Hudson on *Building Contracts* 2nd ed., p. 372). Such a new agreement ought not to be inferred merely from the acquiescence of a building owner in the performance of extra work (*Brown v. Lord Rollo*, 1832, 10 Sess. Ca., 1st series, 667).

Parquet.—A term met with in French legal phraseology to describe the judicial officials instructed with the functions of the *ministère public* (prosecutors or public procurators (see PROCUREUR). It is also used to describe the palaces of the French law Courts where the *ministère public* have their offices.

Parricide (and Matricide), under English law, has always been punishable as murder or manslaughter. It did not constitute the offence of petit treason.

Parson; Parsonage.—The word Parson (*persona*) properly signifies the rector of a parochial or parish church, because during his incumbency he represents the church, and in the eye of the law sustains the person of his church as the person who can sue or be sued on his behalf. The origin of the legal corruption of the idea underlying the word is explained in the article ECCLESIASTICAL CORPORATIONS (see also Pollock and Maitland, *Hist. Eng. Law*, I. pp. 481–491). The use of the word parson (*persona*) is explained by Lindwood (*Prov.* 117), who observes: “Est enim istud nomen, persona, vulgare Anglicorum.” Parson *impersonnee*, i.e. *person impersonata*, is the lawful incumbent in full possession of a parish church whether presentative or inappropriate, with whom it is said to be full.

See, further, articles LAY IMPROPRIATOR; RECTOR; VICAR. Parsonage strictly a church endowed with residence house, glebe, and tithes, etc. As to dilapidation of parsonage house, see DILAPIDATIONS, ECCLESIASTICAL. As to buying and repairing parsonage house, see 17 Geo. III. c. 53, s. 1; 28 & 29 Vict. c. 65, s. 1; and articles GLEBE; RECTORY; VICARAGE.

[*Authorities.*—Lindwood, *Prov.*; Godolphin, *Rep.*; Pollock and Maitland, *Hist. Eng. Law*; Phillimore, *Eccles. Law*, 2nd ed.; Coke, *Inst.*; Gibs. *Cod. Stephen*, *Law relating to the Clergy*; Shaw, *Parish Law*; Stair, *Parish Law*.]

Partial Insanity.—See LUNACY.

Partial Loss.—See MARINE INSURANCE.

Partibus (In)—A term used in the Roman Catholic Church to designate a priest who has been created a bishop, but is as yet without

diocese. As there can be technically no bishop without a diocese, the Pope creates a fictitious diocese in a pagan country, and the priest becoming the bishop thereof is said to be *in partibus infidelium*, or simply *in partibus*. It is purely a title of honour, and no functions are attached to it, nor has the holder any external jurisdiction. Such bishops usually perform the duties that in the English Church fall within the province of a suffragan bishop, or are employed in the nunciatures or in the Roman curia (Calvo, *Dictionnaire de Droit International*, Paris, 1885, vol. ii. p. 64).

Particeps criminis.—See ABETTOR ; ACCESSORY.

Particular Average.—See AVERAGE.

Particular Estate ; Particular Tenant.—Where out of an estate larger in quantity a smaller estate is derived, by grant or otherwise, and there is left in the original owner, or granted at the same time to a third party, an ulterior estate expectant immediately on the determination of the derivative estate, the derivative estate is called the particular estate, and the ulterior estate the reversion or remainder respectively. See REVERSION ; REMAINDER.

The owner of the particular estate is called the particular tenant, in contradistinction to the reversioner or remainderman ; and the term particular is used to denote that the estate in question is a small part only (*particula*) of the larger estate from which it is derived.

If the particular estate were alienated by feoffment from an estate larger than that for which, as a fact, the particular tenant could alienate (*e.g.* if a tenant for life of lands conveyed them by feoffment for an estate in fee-simple), the feoffment was said to operate by wrong, or tortiously, and the estate of the particular tenant was destroyed and converted into the estate purported to be granted. Further, the wrongful conveyance operated also as a forfeiture, and the owner of the estate expectant, on the determination of the particular estate, might re-enter immediately. But the Real Property Act, 1845 (8 & 9 Vict. c. 106), by abolishing this tortious operation of a feoffment, makes the creation of any estate greater than the particular estate void only to the extent of the excess, and the particular estate is therefore not destroyed, nor does the alienation by the particular tenant cause a forfeiture.

See FEOFFMENT ; REMAINDER ; REVERSION.

Particular Lien.—See LIEN.

Particulars.—The object of particulars is to make a litigant state with sufficient fulness the nature of his claim or defence, so as to enable parties to go to trial with a knowledge of the case which they have to meet, and thereby to save expense, and to prevent them from being taken by surprise (per Cotton, L.J., *Hennessy v. Wright*, 1888, 57 L. J. Q. B. 594, 595 ; *Spedding v. Fitzpatrick*, 1888, 38 Ch. D. 410, 413). This shows the difference between particulars and discovery by interrogatories, the object of which is to make a litigant state what he knows about the facts to which

the interrogatories relate (per Bowen, L.J., *Turnock v. Sartoris*, 1888, Sol. J. 58).

Order 19, r. 5, of the Rules of the Supreme Court prescribes that High Court actions the forms in Appendices C, D, and E shall, when applicable, be used for all pleadings. These forms show what particulars should be given in the classes of cases to which they relate.

Order 19, r. 6, requires that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the above-mentioned forms, particulars (with dates and items if necessary) shall be stated in the pleading; but the particulars be of debt, expenses, or damages, and exceed three folios, the fact must be so stated, with a reference to full particulars already delivered or to be delivered with the pleading.

Particulars may be ordered when there are no pleadings in the action (Order 18 *a*, r. 3; Order 30, rr. 1 and 2), and they are one of the matters to be dealt with, as far as practicable, on the summons for directions under Order 30.

The purpose of Order 19, r. 6 (and of Order 30, r. 1), was to make applications for particulars unnecessary (per Sir James Hannen in the *Isis*, 1888 8 P. D. 227, 228); but when such full particulars as the opposite party is entitled to have not been given, an order for further and better particulars may be obtained by summons in chambers upon such terms as may be justified (Order 19, r. 7).

The usual course, when the particulars in a statement of claim or defence are insufficient, is to apply for further particulars before pleading thereto. A party obtaining an order for further particulars has, by Order 19, r. 6, unless the order otherwise provides, the same time for pleading as he has at the return of the summons. The practical result is that, if further particulars of a claim be ordered, the action is in general stayed until they are delivered; but by the same rule an order for particulars does not in any other way operate as a stay of proceedings or give an extension of time. It may be made a term of the order that the action shall be dismissed unless the plaintiff delivers particulars within a given time (*Davey Bentinck*, [1893] 1 Q. B. 185). When a peremptory order has been made against a party for the delivery of a pleading within a given time, an order for particulars does not give him an extension of time (*Falck v. Axthelm*, 1889, 24 Q. B. D. 174). A defendant who fails to comply with an order for particulars of his defence is liable to have it struck out (see *Marshall Inter-Oceanic Steam Yachting Co.*, 1885, 1 T. L. R. 394).

A defendant does not, by delivering his defence, waive his right to particulars (*Watson v. North Metropolitan Tramways Co.*, 1886, 3 T. L. R. 27; *Sachs v. Spielman*, 1887, 37 Ch. D. 295). Even after the pleadings are closed, there seems to be power to make an order for particulars, though it is not likely that such an order will be made when the circumstances of which the application is based were known to the applicant before the closing of the pleadings (*Gouraud v. Fitzgerald*, 1888, 37 W. R. 265).

A party is not entitled to particulars of matters which are within his own knowledge and not within that of his opponent, until he has given discovery (*Millar v. Harper*, 1888, 38 Ch. D. 110). Thus in an action by a principal against his agents for fraud in their transactions on his behalf, it was held that the principal was not bound to give particulars of the fraud under Order 19, r. 6, until he had given discovery of documents (*Whit v. Ahrens*, 1884, 26 Ch. D. 717). In another action for fraud brought

against a stockbroker, the principal was allowed to interrogate, to enable him to give particulars (*Leitch v. Abbott*, 1886, 31 Ch. D. 374). In other actions for fraud where particulars were applied for before defence, the application was ordered to stand over until after delivery of defence or after discovery (*Sachs v. Spielman*, 1887, 37 Ch. D. 295; *Weynes Merthyr Co. v. Radford*, [1896] 1 Ch. 29). In the last-mentioned case it was contended, on the authority of a dictum of Lord Justice Kay's in *Zierenberg v. Labouchere*, [1893] 2 Q. B. 183, 189, that the principle only applies where there is a fiduciary relation between the parties; but Chitty, J., decided against this contention, which is also inconsistent with *Millar v. Harper*, *supra*. The delivery of particulars will apparently not be postponed until after discovery, unless the party shows that his case is a substantial, and not a mere fishing, one (*Weynes Merthyr Co. v. Radford*, *supra*).

A party is bound by his particulars, but it is in the discretion of the Court or judge to allow them to be amended (*Woolley v. Broad*, [1892] 2 Q. B. 317). The Court of Appeal has held that an amendment should be allowed at any time, even though the necessity of an amendment be due to the party's own neglect, if the amendment can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs (*Clarapede v. Commercial Union Association*, 1884, 32 W. R. 262).

In *Moss v. Malings* (1886, 33 Ch. D. 603), North, J., held that he could only grant an application for leave to amend particulars made at the trial if the applicant showed that he could not, with reasonable diligence, have discovered the facts on which the application was based sooner; but the decision of the Court of Appeal in the last-mentioned case was not brought to his notice.

It is impossible to lay down a general rule as to the particulars which must be given, except that they are such as will enable the other party to know what case he has to meet. In general the particulars to be given are of the nature of a party's case, not of his evidence, though it is sometimes difficult to draw the line between the two (*Briton Medical Life Association v. Britannia Fire Association*, 1888, 59 L. T. 888; *Temperton v. Russell*, 1893, 9 T. L. R. 318). On this ground particulars of the names of witnesses ought not, as a rule, to be ordered (*ibid.*; *Duke v. Wisden*, 1897, 77 L. T. 67); but particulars of their names or of other matters of evidence must be given, when they form a substantial part of a fact of which particulars can properly be required (see *Marriott v. Chamberlain*, 1886, 17 Q. B. D. 154; *Humphreys v. Taylor Drug Co.*, 1888, 39 Ch. D. 693; *Temperton v. Russell*, 1893, 9 T. L. R. 318). Thus the plaintiff in a slander action has been ordered to give particulars of the names of the persons to whom or in whose presence he alleges that the slander was uttered (*Bradbury v. Cooper*, 1883, 12 Q. B. D. 94; *Roselle v. Buchanan*, 1886, 16 Q. B. D. 656; *Williams v. Ramsdale*, 1887, 36 W. R. 125). In a libel action a similar order for particulars was refused; but the Court of Appeal based its decision on the ground that the application was too late (*Gouraud v. Fitzgerald*, 1888, 37 W. R. 265; see Odgers, *Libel*, 3rd ed., pp. 559, 560).

When an agreement is alleged in general terms, particulars will be ordered specifying the persons making it, giving its date, and stating whether it was verbal or in writing; and if the latter, identifying the document (*Turquand v. Fearon*, 1879, 48 L. J. Q. B. 703). Equally full particulars will be ordered of representations sued or relied upon in any action (*Seligmann v. Young*, 1884, W. N. p. 93; *Newport Slipway Co. v. Poynter*, 1886, 34 Ch. D. 88; see also *Duke v. Wisden*, *supra*).

Particulars of special damage can almost invariably be obtained (see e.g., *Watson v. North Metropolitan Ry. Co.*, 1886, 3 T. L. R. 273).

A plaintiff must give particulars of the items of which a lump sum is composed which he claims (per Bramwell, L.J., *Philipps v. Philipps*, 1871, 4 Q. B. D. 127, 131; *Gunn v. Tucker*, 1891, 7 T. L. R. 280), or gives credit for in his claim (*Godden v. Corsten*, 1879, 5 C. P. D. 17), unless an order for particulars of items would be oppressive (*Sedgwick v. Yedras Mining Co.*, 1887, 4 T. L. R. 17). When an account only is claimed, particulars need not be given (*Augustinus v. Nerinckx*, 1880, 16 Ch. D. 13; *Blackie v. Osmaston*, 1884, 28 Ch. D. 119); but the fact that an account is claimed will not prevent an order being made for particulars of definite payment claimed or admitted to be due, unless it is evident that an account thereof will have to be taken (*Kemp v. Goldberg*, 1887, 36 Ch. D. 505).

In an action for defamation, when the charge made against the plaintiff is general in its nature, and the defendant justifies, he must give particulars of the facts on which he relies (*Devereux v. Clarke*, [1891] 2 Q. B. 582; *Zierenberg v. Labouchere*, [1893] 2 Q. B. 183); but where a defendant justifies in respect of specific charges, particulars are not necessary (*Cumming v. Green*, 1891, 7 T. L. R. 408). Particulars will be ordered of an ambiguous plea of justification (*Henning v. Wright*, 1888, 57 L. J. Q. B. 594).

A defendant in an action for defamation who does not justify cannot by Order 36, r. 37, give evidence in chief in mitigation of damages, without the leave of the judge, unless seven days before the trial he has given the plaintiff particulars of the evidence.

In actions for seduction, particulars have been refused to a defendant before defence, unless he stated on affidavit that he was not guilty of the seduction (*Thomson v. Birkley*, 1882, 47 L. T. 700; *Knight v. Engle*, 1889, 61 L. T. 780; *contra*, *Kelly v. Briggs*, 1888, 85 L. T. Jour. 78).

In probate actions the names of persons who are alleged to have procured the making of a will by undue influence must be given; but it is settled practice not to order particulars of the acts of undue influence (*Salisbury v. Nugent*, 1883, 9 P. D. 23). Where a will was disputed on the ground of the testator's unsoundness of mind, particulars were refused on the ground that they could not be given of a plea which depends upon the whole life and conduct of a man (*Hankinson v. Barningham*, 1885, 9 P. D. 62).

The plaintiff in an action for the recovery of land who claims a heir-at-law, will be ordered to give particulars of his pedigree (*Palmer v. Palmer*, [1892] 1 Q. B. 319).

Where a road was alleged to have become a highway by dedication, the party so alleging was ordered to give particulars of any specific acts of dedication on which he relied (*Spedding v. Fitzpatrick*, 1888, 38 Ch. D. 410).

There are some statutes under which specified particulars must be given in certain cases. In an action under Lord Campbell's Act (9 & 10 Vict. c. 93, s. 4), the plaintiff must deliver with his statement of claim a full particular of the persons on whose behalf the action is brought and of the nature of the claim. In an action for infringement of copyright in a book, the defendant on pleading must, under 5 & 6 Vict. c. 45, s. 16, give notice in writing of the objections to the plaintiff's title on which he means to rely (see *Hole v. Bradbury*, 1879, 12 Ch. D. 886). In an action for infringement of a patent (The Patents, Designs, and Trade Marks Act, 1884 (46 & 47 Vict. c. 57, s. 29)), the plaintiff must deliver particulars of the breaches complained of; and the defendant, of the objections on which he relies in support of his defence (see PATENTS). The Railway and Canal

Traffic Act, 1888 (51 & 52 Vict. c. 25, s. 33, subs. 3), requires a railway company to give particulars of the manner in which the charge for the carriage of goods is divided, and this obligation is enforced in litigation as to these charges (*London and North-Western Rwy. Co. v. Lee*, 1891, 7 T. L. R. 603).

Particulars will not be ordered of any allegation which is immaterial (*Cave v. Torre*, 1886, 54 L. T. 515), or in respect of which the burden of proof is on the party asking for them (*James v. Radnor County Co.*, 1890, 6 T. L. R. 240). Applications for particulars of facts have also been refused, when the facts were within the knowledge of the party applying (*Roberts v. Owen*, 1890, 6 T. L. R. 172), or where the particulars would be useless (*Maxim Nordenfelt Co. v. Nordenfelt*, [1893] 3 Ch. 122). There is, however, no doubt that particulars will be given of matters within the knowledge of the applicant, where they are necessary to enable him to understand the nature of his opponent's case. When a summons for particulars is in fact a series of interrogatories, it should be dismissed, as being an attempt to evade the practice and rules of the Court (*Lister v. Thompson*, 1890, 7 T. L. R. 107). Particulars which would be oppressive will not be granted (*ibid.*; *Sedgwick v. Yedras Mining Co.*, 1887, 4 T. L. R. 17). In the last-mentioned case the claim was for a *quantum meruit* for services, no charge being made for any specific acts of service. Particulars were ordered of the services rendered, but refused as to dates and items.

In County Court actions the plaintiff is required by Order 6, r. 1 *a*, of the County Court Rules, at the time of entering the plaint to file particulars of his demand, unless the action is brought for debt or damages not exceeding 40s. (see also Order 5, r. 5 *a*; Order 6, rr. 2, 4, 5, 7, 10 *a*; Order 11, r. 1; Order 27, rr. 4 *a*, 7, 8; Order 30, r. 3; Order 34, r. 2). Further particulars of the claim may be ordered under Order 6, r. 8. The particulars may be amended, or part of the claim abandoned, under Order 14, rr. 13, 14. A defendant who relies on a set-off or counterclaim must give particulars under Order 10, r. 11, and notice of special defences to claims or counter-claims is required by the County Courts Act, 1888, s. 82, and Order 10, rr. 10–21.

[*Authorities.*—*Annual Practice*, notes to Order 19, rr. 6, 7, 8; Odgers on *Pleading*, 3rd ed., pp. 159–169; Bullen and Leake, *Precedents of Pleading*, 5th ed., pp. 37–41.]

Particulars of Sale.—Where realty, or property in the nature of realty, is offered for sale by auction, it is usual to publish particulars and conditions of sale, which are generally printed together; if not so printed, they should be made to explicitly refer to one another (*Kenworthy v. Schofield*, 1824, 2 Barn. & Cress. 945; 26 R. R. 600; *Rishton v. Whatmore*, 1878, 8 Ch. D. 467). “The proper office of the particulars is to describe the subject-matter of the contract, that of the conditions to state the terms on which it is sold” (per Malins, V.-C., in *Torrance v. Bolton*, 1872, L. R. 14 Eq. 124, 130; aff. 1872, L. R. 8 Ch. 118); and the omission from the particulars of a fact, as, for instance, a mortgage on the property, which ought to be stated in them, is not necessarily remedied by a statement of it in the conditions (*ibid.*).

The particulars and conditions, together with the memorandum, signed by the purchaser, which is usually annexed to, or indorsed on them, form the contract of sale (see CONDITIONS OF SALE), and, except where there has been fraud or mistake, they cannot be contradicted, varied, or added to by

any verbal declarations made by the auctioneer at the time of sale (*Gunni v. Erhart*, 1789, 1 Black. H. 290; 2 R. R. 769; *Higginson v. Clowes*, 1808, 1 Ves. 516; 10 R. R. 112; *Powell v. Edmunds*, 1810, 12 East, 6; 11 R. R. 316; *Jones v. Edney*, 1812, 3 Camp. 285; 13 R. R. 803; *Manser v. Back*, 1848 6 Hare, 443; Dart, 124). If there is any error or omission in the particulars they should be carefully amended, and pains taken that only corrected copies are distributed. Notice of any correction should be given to the bidders, and embodied in the memorandum before it is signed (*Shelton v. Lavius*, 1832, 2 Crompt. & J. 411, 416; *Page v. Cowasjee Eduljee*, 1866, L. R. 1 P. C. 127; *Goddard v. Jeffreys*, 1881, 51 L. J. Ch. 57).

The following are matters to be noticed in the particulars:—

- (1) The nature, and a description of the property.
- (2) The tenure; it being borne in mind that, in the absence of any specific description or stipulation to the contrary, a general agreement to sell land is considered to mean an agreement to sell an estate in fee-simple (Dart, 128).
- (3) The nature of the tenancy, if the property is let, as to period, unusual covenants, etc., and the annual income, if any, from rental.
- (4) Rights, etc., of other parties, *e.g.* incumbrances, easements, etc. Where the property is held under a lease containing unusually stringent covenants, the fact should be stated, unless a fair and reasonable opportunity has been given to the purchaser of inspecting the lease (*In re White & Smith's Contract*, [1896] 1 Ch. 637).
- (5) Unusual outgoing, or anything in the nature of a permanent charge on the property.
- (6) Time and place of sale, and name of the auctioneer.
- (7) The name, or a sufficient description of the vendor. If this does not appear on the particulars or conditions, it should be stated in the agreement or memorandum (*Shelton v. Cole*, 1857, 1 De G. & J. 587; *Potter v. Duffield*, 1874, L. R. 18 Eq. 4; *Jarrett v. Hunter*, 1886, 34 Ch. D. 182; Dart, 252).
- (8) The parties to whom application is to be made for particulars and conditions, and for a view of the property.
- (9) As a measure of precaution, it is usual to add “unless previously disposed of by private contract,” or words to that effect.
- (10) On a sale of land, a plan is frequently appended. When this is done, care must be taken that the plan is accurate. It is not generally advisable to show rights of way; in many cases they are not easily ascertainable, and the better course is to insert a protecting condition that the property is sold subject to all such rights.

Although a certain latitude of expression is allowed, fairness and accuracy must be observed in drawing particulars (*Swaishland v. Dearsley* 1861, 29 Beav. 430, 436; *Coverly v. Burrell*, 1821, 5 Barn. & Ald. 257 24 R. R. 350), for it is the duty of the vendor to describe everything which it is material to know in order to judge of the nature and value of the property (*Brandling v. Plumer*, 1854, 2 Drew. 427, 430). A fraudulent misdescription renders the contract voidable (see FRAUD); and, even in the absence of fraud, where there is a misdescription “in a material and substantial point, so far affecting the subject-matter of the contract that it may be reasonably supposed that but for such misdescription the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause” (per Tindal, C.J., in *Flight v. Booth*, 1834, 1 Bing. N. C., 370, 377 *In re Fawcett & Holmes*, 1889, 42 Ch. D. 150). Ambiguity in the particulars

may also be fatal to the contract (*Swaisland v. Dearsley*, 1861, 29 Beav. 430, 433; *Higginson v. Clowes*, 1808, 15 Ves. 516; 10 R. R. 112; *Tamplin v. James*, 1880, 15 Ch. D. 215, 218; see CONTRACT, vol. iii. pp. 343-345).

The draft particulars should generally be submitted to the solicitor; where no solicitor is employed, the auctioneer should submit them to his principal.

[*Authorities.*—See Dart, *Vendors and Purchasers*, 6th ed., 1888; Bateman, *Law of Auctions*, 7th ed., 1895; Webster, *Law relating to Particulars and Conditions of Sale on a Sale of Land*, 1889.]

Parties.

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At the head of every writ the names of the parties are set out, and if any change be made in the parties during the course of the action, the writ should be amended accordingly. These names form the title of the action, and in the selection of the parties there is a twofold chance of error. The plaintiff may omit parties whose presence is essential, or he may add parties whose presence is improper. In some few cases he has an option, and can join one or more parties as he chooses. But, as a rule, the law is precise; certain parties are necessary, and must be joined; certain other parties are unnecessary, and must not be joined. To make a false start in either of these respects will inevitably involve the plaintiff in trouble and expense at some stage or other of the proceeding.

Former Strictness.—Formerly, indeed, the consequences of a mistake as to parties were far more serious. Misjoinder of a plaintiff was ground of non-suit, while non-joinder of a necessary plaintiff was the subject of a plea in abatement (see ABATEMENT, PLEAS IN, vol. i. p. 20). In actions founded upon a contract, the non-joinder, as defendant, of a co-contractor was ground for a plea in abatement. But the non-joinder of a necessary co-plaintiff, though it might be objected to by such a plea, was even more fatal, as the defendant might, if he thought fit, traverse the alleged contract, and thus show a variance at the trial which would entitle him to judgment. Or, where the declaration showed the defect, he might demur (see PLEADING). Hence the law and practice as to parties in actions of contract was, prior to 1875, of especial importance. In actions of tort, however, the non-joinder of a defendant never was any ground of objection. A defendant could never plead in abatement or in bar that another joint-wrongdoer has not been made a co-defendant (*Mitchell v. Tarbutt and others*, 1794, 5 T. R. 649).

Modern Practice.—And even now, although no action is to be defeated merely by reason of misjoinder or non-joinder of parties (Order 16, r. 11),

still any slip of this kind must cause delay and expense, and leads to difficulties which may prove insurmountable. By the same rule, ‘a person shall be added as a plaintiff suing without a next friend, or as next friend of a plaintiff under any disability, without his own consent writing thereto.’ It sometimes happens that a necessary co-plaintiff is not consent to be added; and if he be joined as a co-plaintiff without consent, his name will be struck out, and the solicitor who issued the writ will be ordered to pay his costs as between solicitor and client, and also costs occasioned to the defendant by such improper joinder (*Fricker v. Grutten*, [1896] 2 Ch. 649; *Gold Reefs Limited v. Dawson*, [1897] 1 Ch. 1; *Geilinger v. Gibbs*, [1897] 1 Ch. 479).

I. IN ACTIONS OF CONTRACT.

In actions founded upon a contract, the rules relating to parties depend largely on whether the contract sued on be joint, or several, or joint and several. A contract will be held to be joint or several according to the intention of the parties, and what their intention was will be determined mainly and primarily, by the language which they have used, though the judge will also have regard to the respective interests of the parties, to the conduct, and to all the surrounding circumstances.

If a contract be made with several persons jointly, *e.g.* with the trust of a settlement, all of them who are still living must join as co-plaintiffs in any action for its breach. If a contract be made by several persons jointly, all of them who are still living must be joined as co-defendants. ‘A joint debtor has a right to demand, if he pleases, that he shall be sued at once and the same time with all his co-debtors’ (per Bowen, L.J., in *In Hodgson, Beckett v. Ramsdale*, 1885, 31 Ch. D. at p. 188; and see *Pilley v. Robinson*, 1887, 20 Q. B. D. 155). The personal representatives of a deceased joint-creditor should not be joined as plaintiffs, nor should the personal representatives of a deceased joint-debtor be joined as defendants; for the right to sue and the liability on a contract vest in the survivors (though the creditors would have an equitable claim against the estate of a deceased joint-debtor, if administration proceedings were taken in equity). Only the survivors should be made parties. But if all the persons originally entitled to sue on such a joint-contract be dead, the personal representative of the last-surviving creditor must sue; if all the persons originally liable on such a contract be dead, the personal representatives of the last surviving debtor must be sued.

If, however, the contract made by two or more persons be *several* as well as *joint*, the plaintiff may sue one or more, or all of them, in the same action. If he joins them all, he can in the same action claim against them jointly, and also against each of them severally (Order 16, r. 1). If he does not join them all, then he can only rely on the several liability of those whom he has chosen to sue.

If the contract be *several* and not *joint*, the plaintiff may, at his option, join as parties to the same action all or any of the persons liable thereon, and if any of the persons originally liable on that contract be dead, he may also, if he chooses, add the executors or administrators of such deceased persons.

By sec. 59 of the Conveyancing and Law of Property Act, 1881 (45 Vict. c. 41), any covenant, bond, or obligation under seal made after 31st December 1881, ‘though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators and personal estate of the person making the same, a

heirs were expressed." The creditor is not bound, however, to sue both the real and personal representatives of the deceased obligor; he may proceed against either or both. But if he elect to proceed against the real estate, and his deceased debtor by his will devised it away, then he must sue both the heir and the devisee (if necessary, the devisee of such devisee) in one action. It is only if there be no heir that he may sue the devisee or devisees solely (1 Will. IV. c. 47, ss. 3, 4).

II. IN ACTIONS OF TORT.

In an action for a wrong arising out of a contract, the same persons must be joined as parties as are necessary in actions for breach of contract.

In actions of pure tort (*i.e.* for a wrong wholly independent of contract), one tenant in common of land or goods can always sue alone, without joining his co-tenants in common as plaintiffs (*Lauri v. Renad*, [1892] 3 Ch. 402; *Roberts v. Holland*, [1893] 1 Q. B. 665). But where several persons are joint-owners or joint-occupiers of any land or premises prejudicially affected by any trespass, nuisance, or other wrongful act, or the joint-owners of any chattels which the defendant has taken, destroyed, or injured, whether by negligence or design, they should all, as a rule, be joined as co-plaintiffs in the action.

In all cases, however, of actions for the prevention of waste, or otherwise for the protection of property, one person may sue on behalf of himself and all persons having the same interest (Order 16, r. 37). And one of several co-owners of a patent may sue alone for an infringement of his right (*Sheehan v. Great Eastern Ry. Co.*, 1880, 16 Ch. D. 59); and so may one of several co-owners of a trade-mark (*Dent v. Turpin*, 1861, 30 L. J. Ch. 495).

As to defendants in an action of tort, the plaintiff has a free hand. He is not now, and never was, obliged to join as a defendant every person who is liable to him for that tort. He may, if he prefers, sue only one or two; and the liability of the others will be no defence for those sued, and will not mitigate the damages recoverable, for all persons concerned in a common wrongful act are jointly and severally liable for all damage caused by it (*Co. Litt.* 232 *a*; *Sutton v. Clarke*, 1815, 6 Taun. 29; 16 R. R. 563). But the judgment against these is a bar to any subsequent action for the same tort against anyone else who was *jointly* liable with them, even though the judgment in the first action has not been satisfied (*Brinsmead v. Harrison*, 1872, L. R. 7 C. P. 547). Thus, where a libel has appeared in a newspaper, the person libelled may join as defendants in the same action the proprietor, the editor, the printer, and the publisher, or any one or more of them, as he thinks fit, for all are jointly and severally liable for the publication and its consequences. If he thinks fit to sue some only of those who are liable to him, those whom he sues cannot subsequently claim contribution from the rest (*Colburn v. Patmore*, 1834, 1 C. M. & R. 73; *Merryweather v. Nixan*, 1799, 8 T. R. 186; 1 Smith, *L. C.*, 10th ed. 383; 16 R. R. 810). Nor can the plaintiff after judgment against one ever sue the others for the same publication (*Munster v. Cox*, 1885, 10 App. Cas. 680).

III. IN ACTIONS FOR THE RECOVERY OF LAND.

In such actions the proper plaintiff is the person who is now entitled at law to immediate possession of the property. He may be the freeholder or only a tenant. If there be no tenancy created by, or otherwise binding on, the freeholder, then his ownership involves the right to present possession. And as between freeholders, the first tenant for life is the proper plaintiff

there is no need to join any remainderman or reversioner. Similar the persons actually in physical possession of the property must *all* made defendants; but it is not necessary or proper to join any person who is merely in receipt of the rents and profits of the land. By sec. 209 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), the tenant bound, under penalty of three years' rent, "forthwith" to give notice to the landlord that a writ in ejectment has been served on him. And the landlord can then at once obtain leave to appear and defend the action under Order 12, rr. 25, 26, 27. The Master will grant him such leave on an *ex parte* application, supported by an affidavit showing that the person in possession of the land sought to be recovered is his tenant.

One tenant in common or coparcener can sue alone without joining the co-tenants or coparceners as plaintiffs, and recover such portion of the land as he or she proves title to. But all joint-tenants must, strictly, join as plaintiffs in the action. And the plaintiffs must have the legal estate in the land. A beneficiary who seeks to recover possession of land upon an equitable title cannot succeed without making the person in whom the legal estate is vested a party to the action (*Allen v. Woods*, 1893, 68 L. T. 14). And, strictly, he should make such person a co-plaintiff. If, however, such person refuses to be joined as a plaintiff, the person equitably entitled will, perhaps, be allowed to join him as a defendant.

IV. VARIOUS CLASSES OF PERSONS.

1. *Husband and Wife*.—A married woman may now sue and be sued whether in contract, tort or otherwise, in all respects as if she were *feme sole*; and her husband need not be joined with her as plaintiff or defendant (Married Women's Property Act, 1882 (45 & 46 Vict. c. 75) s. 1). If, however, the husband has sustained any special damage, he should join as a co-plaintiff, so as to dispose of all questions in one and the same action.

A plaintiff who has a cause of action against a married woman may sometimes prefer to sue the husband, or both husband and wife, if he can, especially if the wife is restrained from anticipating her separate property. On a contract made by a married woman since the marriage, it is not impossible for *both* husband and wife to be liable. For either the wife was agent for her husband to make that contract on his behalf, or she was not. If she was, then he alone is liable. If she was not, he cannot be liable; but she is, for she shall be deemed to have entered into the contract with respect to and intending to bind her separate estate; and this whether she was or was not in fact possessed of, or entitled to, any separate estate when she made the contract (56 & 57 Vict. c. 63, s. 1; the law is otherwise in the case of a contract made by a married woman prior to December 5th, 1891). It is never necessary to join the trustees of her separate estate as co-defendants (*Davies v. Jenkins*, 1877, 6 Ch. D. 728, 730).

If, however, an action is brought against any woman married on or after July 30th, 1874, in respect of any contract made, or tort committed, by her before marriage, the plaintiff may, if he thinks fit, join the husband, for he is liable to the extent of any property which he has acquired from her through his wife (37 & 38 Vict. c. 50; 45 & 46 Vict. c. 75, ss. 13, 14, 15 and see Order 18, r. 4). Or the plaintiff may sue the husband alone (*Beck v. Pierce*, 1889, 23 Q. B. D. 316).

A husband is still liable to the full extent for any tort committed by his wife since their marriage. There is nothing in any of the Married Women's Property Acts removing or restricting the common law liability

of husband in this respect (*Seroka and Wife v. Kattenburg and Wife*, 1886, 17 Q. B. D. 177). Hence a plaintiff who sues for a tort committed by a married woman during her coverture generally sues both husband and wife in the old common law way. And if the husband is thus compelled to pay damages and costs for the tort of his wife committed during coverture, he has apparently no remedy over against her separate estate.

2. *Infants*.—An infant sues by his next friend, who is personally liable for the costs of the suit (*Caley v. Caley*, 1877, 25 W. R. 528); but security for costs will not be required from him, lest the infant should lose his rights altogether (*Fellows v. Barrett*, 1836, 1 Keen, 119). An infant defends by a guardian *ad litem* (see Order 16, rr. 18, 19, 21; Order 13, r. 1; and Order 55, r. 27). A guardian *ad litem* will not be ordered to pay costs, unless he has been guilty of gross misconduct (*Morgan v. Morgan*, 1865, 12 L. T. 199; 11 Jur. N. S. 233). A married woman cannot be made a guardian *ad litem* (*In re Duke of Somerset*, 1887, 34 Ch. D. 465). Hence whenever an infant appears by a female guardian, the memorandum of appearance should state whether she is a spinster or a widow (*London & County Bank v. Bray*, 1893, W. N. p. 130).

3. *Lunatics*.—A lunatic who has not yet been found of unsound mind by inquisition sues by his next friend; if he has been, then by his committee, who before commencing the action must obtain the sanction of the Lords Justices and of the Master in Lunacy in the proper way. Lunatics defend an action by their committee, if one be appointed, and if he had no adverse interest; in other cases, by a guardian *ad litem*, appointed *ad hoc*.

4. *Partners*.—Partners now may sue and be sued in the name of their firm; but if they sue in the firm name, they can be compelled to disclose the name and address of every member of the firm (see Order 48 *a*, r. 1). If they are sued in their firm name they must enter an appearance in their own names individually; but the subsequent proceedings will continue in the name of the firm (r. 5; see PARTNERSHIP; and Order 48 *a*, generally).

5. *Corporations*.—A corporation is a legal person, and can sue and be sued in its corporate name. So is a Company, Limited.

6. *Trustees*.—In any action concerning trust property, all the trustees within jurisdiction must, as a rule, be joined; in any action concerning the estate of a deceased person, all administrators, or all executors who have proved the will, must be joined (see *Latch v. Latch*, 1875, L. R. 10 Ch. 464).

But in neither case is it necessary to add any of the persons beneficially interested in the trust or estate (Order 16, r. 8; *Merry v. Pownall*, [1898] 1 Ch. 306). Thus, where a legacy was bequeathed to A. in trust for X. and Y., and A. was made defendant, it was held unnecessary to join X. and Y. as parties to the action, as they were represented by their trustee (*In re Bowden, Andrew v. Cooper*, 1890, 45 Ch. D. 444). So, too, it is unnecessary to make the representative of a deceased trustee or executor a party to an action, if there be a surviving trustee or executor (*In re Harrison, Smith v. Allen*, [1891] 2 Ch. 349).

Whenever any party sues, or is sued, in a representative character, this fact must be stated, both on the writ and also in the title or heading of the statement of claim (*In re Tottenham*, [1896] 1 Ch. 628).

7. *Mortgagor and Mortgagee*.—Any mortgagor who is entitled for the time being to possession of the mortgaged property, or to receive the rents and profits of it, may sue for possession of it, or to recover such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong done to it, without joining his mortgagee as a co-plaintiff (Judicature Act 1873, s. 25, subs. (5)).

8. *Assignor and Assignee*.—The assignee of any legal chose in action may sue for it without joining his assignor as a co-plaintiff, provided the assignment be absolute and in writing under the hand of the assignor, and provided also that notice in writing of the assignment has before action been given to the debtor or holder of the fund (Judicature Act, 1873, s. 25, subs. (1)). In all other cases the assignor must be made a party to the action, either a plaintiff or a defendant (see ASSIGNMENTS OF CHOSSES IN ACTION, vol. 1, p. 352).

9. *Representative Parties*.—In certain cases individuals are allowed to come forward and represent all persons claiming the same interest or standing in the same position as themselves. In some cases the Court will insist on a man's being made to represent a class, even against his will. Thus in *Wood v. McCarthy* ([1893] 1 Q. B. 775), the officers of a trades union were ordered to represent the members of their league who were too numerous to be made parties. So one or more of the shareholders in a cost-book mine may sue or be sued on behalf of the whole number. In *In re Foster* (1890, 45 Ch. D. p. 630), Kay, J., appointed residuary legatee to represent all the remaindermen under a will. A person may generally whenever there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, and may be authorised to defend in such cause or matter, on behalf or for the benefit of all persons so interested (Order 16, r. 9). But this rule only applies to persons who have or claim some proprietary right which they are asserting or defending in the cause or matter (*Temperton v. Russell*, [1893] 1 Q. B. 435). (And see Order 16, r. 39; Order 55, r. 40).

V. MISNOMER.

A mere misnomer can always be corrected without leave. Thus if a party to the action is improperly or imperfectly named on the writ, counsel should insert the right name in the pleadings, with a statement that this is the person suing or sued by the name on the writ (e.g. "John William Smythe sued as 'J. M. Smith.'"). The defendant can take no advantage of such an alteration, as pleas in abatement for misnomer were abolished long ago as 1834. But where a defendant has executed a deed by a wrong name, it is right to sue him by the name in which he executed it (see *Williams v. Bryant*, 1839, 5 Mee. & W. 447; *Mayor of Lynn's case*, 161 10 Rep. 122 b).

VI. CHANGE OF PARTIES.

The plaintiff has an opportunity of reconsidering the question of parties when preparing the statement of claim. The defendant, also, may have something to say on the matter; if so, he should take action before delivering the defence. Lastly, the judge at the trial has full power in a proper case, either upon or without the application of either party, to strike out or to add any party, so as to effectually and completely adjudicate and settle all questions involved in the action. Changes may also become necessary by reason of the marriage, death, or bankruptcy of one of the parties, or the assignment or devolution of the property in dispute *pendente lite*.

1. *By the Plaintiff*.—The statement of claim must show a right to the action in every plaintiff, and a liability on the part of each defendant. Hence in drafting it, counsel must carefully consider whether all necessary parties are named on the writ, and also whether all named on the writ are necessary parties. If he comes to the conclusion that any plaintiff or defendant named on the writ is not a necessary party to the action, he can

always drop him if he wishes, without any summons, by merely omitting his name on the statement of claim. But it will probably save costs to serve any defendant thus released with a formal notice of discontinuance under Order 26. The statements of claim, delivered to the other defendants who are retained as parties to the action, must be identical in their contents. On the other hand, if the plaintiff's counsel finds that a necessary party is not named on the writ, he must proceed at once to add him, which can only be done on an application under Order 16, rr. 11 or 12. And such an application will not be granted if it appears that the original plaintiffs have no cause of action, and that the object of the amendment is to introduce a new plaintiff in whom there is a right of action, and so to start an entirely new cause (*New Westminster Brewery Co. v. Hannah*, 1876, W. N. p. 215; 1877, W. N. p. 35; *Ayscough v. Bullar*, 1889, 41 Ch. D. 341). So, too, an application to add new defendants will be refused if it appears clearly that none of the existing defendants are liable, and that the plaintiff's object is to merely introduce some new defendants, against whom he thinks he will have better chance of establishing liability, for this "is to change one action into another" (*Raleigh v. Goschen*, [1898] 1 Ch. 73). If the order be made, then strictly, the writ should be amended by adding the new name; for it is a rule that the statement of claim should always correspond with the writ "in the names of the parties, in the number of the parties, and in the characters in which they sue and are sued" (see Order 16, r. 13; and *In re Tottenham*, [1896] 1 Ch. 628).

2. *By the Defendant*.—At common law it was no part of the duty of the defendant to correct or amend the writ. The plaintiff made parties whomsoever he chose: if he made an erroneous selection, the defendant was at liberty to take full advantage of the slip; it was not his business to set it right. In most cases, however, he had to give the plaintiff notice of the objection by placing a plea in abatement on the record. By sec. 35 of the C. L. P. Act, 1852, he was required to give the plaintiff notice that he had not joined a necessary plaintiff. If he complained of the non-joinder of a necessary defendant, he was required by sec. 8 of the 3 & 4 Will. IV. c. 42, to help the plaintiff to "a better writ" by filing an affidavit stating the names and addresses of all defendants whom he wished to have added; and then the plaintiff could at once add their names on the writ, serve them, and proceed (C. L. P. Act, 1852, s. 38).

The Judicature Act goes a step further. It is now the duty of the defendant, if he discovers a formal defect of this kind, to make some effort to set it right. If he lies by and does nothing, he waives the objection (*Twinborrow v. Braid*, 1878, W. N. p. 169). It is submitted that it is no longer open to a defendant to raise by his pleading under Order 25, r. 2, any point of law as to parties; the language of Order 21, r. 20, is clear and precise: "No plea or defence shall be pleaded in abatement" (see ABATEMENT, PLEAS IN, vol. i. p. 20). If the defendant considers that the proper parties are not before the Court, his remedy is to take out a summons under Order 16, r. 12, to add or strike out or substitute a plaintiff or a defendant (*Kendall v. Hamilton*, 1879, 4 App. Cas. 504). If, for instance, the plaintiff sues the defendant alone for a debt due from a firm, the defendant should apply to have his partners joined as co-defendants, if they are still alive and within jurisdiction. And in every case where a plea in abatement in respect of non-joinder of a defendant could formerly have been pleaded with success, the defendant should (subject to the rules as to one or more persons representing all the parties, such as Order 16, rr. 9 and 37) take out a summons to add the party who ought to have been joined, the action,

where necessary, being in the meantime stayed (*Pilley v. Robinson*, 1. 20 Q. B. D. 155). On a summons to join a defendant, the Court will be guided by the principles on which before the Judicature Act a plea abatement would have been held good or bad (*Wilson, Son, & Co. v. Balca Brook Steamship Co. Ltd.*, [1893] 1 Q. B. 422). But not necessarily where the defendant asks to have a plaintiff joined (*Roberts v. Hollis* [1893] 1 Q. B. 665); for a fresh plaintiff cannot be added without consent in writing (Order 16, r. 11).

3. *On the Application of a Person not a Party.*—It sometimes, but frequently, happens that a third person not a party to the action desires to intervene and contest some point involved in the action. The Court has power under Order 16, r. 11, to add such a person. As a rule, however, the existing parties object to such an intrusion, and in that event the order is rarely made. Still, it may be right to make the order in spite of such objection (*Debenture Corporation v. De Murrietta & Co.*, 1892, 8 T. L. R. 496). Where the plaintiff was bankrupt and the trustee of his bankruptcy applied to be substituted for him as plaintiff, the Court ordered that the trustee should be joined as a co-plaintiff, and gave him the conduct of the action (*Emden v. Carte*, 1881, 17 Ch. D. 173, 768; but see *Hoare & Co. v. Baker*, 1887, 4 T. L. R. 26). In the case of an action for the recovery of land, a person not named as defendant may by leave appear and defend on filing an affidavit showing that he is in possession of the land either himself or his tenant (see Order 12, rr. 25, 26, 27). So equitable mortgage of the property, not parties to the action, have been allowed to intervene even after a judgment for its recovery (*Jacques v. Harrison*, 1883, Q. B. D. 136, 165).

4. *By Death, Marriage, Bankruptcy, or Assignment.*—If pending an action any of the parties die, marry, or become bankrupt, and the action does not abate (as to which, see ABATEMENT and ACTIO PERSONALIS MORITUR CUM PERSONA, vol. i. pp. 15, 105), or if the property in dispute be transmitted to or devolve on any person not already a party to the action, the Master at chambers will, if necessary for the complete settlement of all the questions involved, order the personal representative, husband, trustee, or other successor in interest to be made a party, or served with notice in a form prescribed (Order 17, rr. 2, 3). So, if a person interested comes into existence after the commencement of the action, and it is necessary or desirable to make such person a party, or if any other event occurs which causes “a change or transmission of interest or liability” (as to the meaning of these words see *In re Berry*, [1896] 1 Ch. 939), a similar order may be made (r. 1). Application for any such order can be made before judgment *ex parte* to a Master at chambers on an affidavit setting out the facts; after judgment any such application must be made either with the consent of, or after notice to, the other parties (*In re Holmes*, 1892, W. N. 177).

5. *At the Trial.*—Any application to add or strike out or substitute a plaintiff or defendant may be made to the judge at the trial of the action in a summary manner (Order 16, r. 12). And whether any such application be made to him or not, the judge at the trial (or, in a proper case, even after the trial, *The Duke of Buccleuch*, [1892] Prob. 201) may on such terms as appear to him just strike out the names of any parties improperly joined or add the names of any parties, whether as plaintiffs or defendants, who ought to have been joined, or whose presence before him is necessary to enable him effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter. In future, “no cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties

(Order 16, r. 11). "These words are the key to the whole" (per Lindley, L.J., in *Moser v. Marsden*, [1892] 1 Ch. at p. 490).

VII. THIRD PARTIES.

A "third party" is a person who is not an original party to the action, but is brought in and made a party to the action by the defendant. This may happen in two different ways:—

(1) Under subsec. (3) of sec. 24 of the Judicature Act, 1873, a defendant who is counterclaiming against the plaintiff may make a person who is not yet a party to the action defendant to that counterclaim along with the plaintiff. Relief must be claimed against the plaintiff as well as against the third person; and the relief thus claimed must relate to, or be connected with, the subject-matter of the plaintiff's original claim (*Padwick v. Scott*, 1876, 2 Ch. D. 736; *Turner v. Hednesford Gas Co.*, 1878, 3 Ex. D. 145; *Barber v. Blaiberg*, 1882, 19 Ch. D. 473). A second title must be added at the head of the pleading (Order 21, r. 11). The counterclaim must then be served on the third party, and he must appear thereto as though it were a writ; and he must plead thereto as though it were a statement of claim (*ibid.*, rr. 12, 13, 14). A third party thus brought in as defendant to a counterclaim cannot counterclaim in the action against either plaintiff or defendant (*Street v. Gover*, 1877, 2 Q. B. D. 498; *Alcoy and Gandid Rwy. Co. v. Greenhill*, [1896] 1 Ch. 19). And if A. sues X., X. cannot bring in Y., in order that X. and Y. may set up a joint counterclaim against A. (*Pender v. Taddei*, (1898] 1 Q. B. 799).

(2) It is not often, however, that the defendant has any claim against the plaintiff along with a third person; he more frequently seeks relief against a third person apart from the plaintiff. Such a claim is clearly not a counterclaim at all, as no cross-relief is sought. It is really an independent action. Can the defendant, then, bring such a separate claim into the plaintiff's action? The plaintiff naturally will object to the delay and expense caused by his being compelled to attend proceedings in which he has no interest. Hence it is only in cases falling within rule 48 of Order 16 that the defendant can have recourse to what is called "third-party procedure."

It may be that there is some one who is not at present a party to the action, but from whom the defendant, if himself found liable in the action, may have a right to claim "contribution or indemnity." For instance, a surety, if found liable and compelled to pay the debt, is entitled to contribution from any co-surety. So, if an agent be sued on a contract properly made by him on behalf of his principal, he is entitled to be indemnified by that principal. In such cases the defendant may, as soon as the defence is delivered (*In re Gibson*, [1894] 2 Ch. 92), avail himself of Order 16, r. 48, and issue what is called "a third-party notice," stamped with the seal with which writs of summons are sealed, and stating the nature and grounds of his claim in the form given in R. S. C. App. B. (Form No. 1), with such variations as circumstances may require. This notice must be served on the third party like a writ, within the time allowed the defendant for his defence. One defendant may also serve his co-defendant with a third-party notice (r. 55). If the third party desires to dispute either the plaintiff's claim against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party must enter an appearance in the action within eight days from the service of the notice upon him. In default of his so doing, he will be deemed to admit the validity of any judgment that the plaintiff may obtain

against such defendant, whether by consent or otherwise, and his liability to contribute or indemnify, as the case may be, to the extent claimed in the third-party notice; and the defendant who gave that notice is entitled to enter judgment against the third party to that extent (Order 16, rr. 49, 50, 51). If, however, the third party appears pursuant to the third-party notice, the defendant giving the notice should apply to the Master for directions. If upon the hearing of such application he satisfies the Master that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claim in whole or in part, the Master will order that question to be tried between the third party and the defendant giving the notice, at or after trial of the action, in such manner as he may direct; or he may give the third party liberty to defend the action, upon such terms as may be just; or he may direct the third party to appear at the trial, and take such part therein as may be just; and generally he may order such proceedings to be taken, documents to be delivered, or amendments to be made, and give such directions as may appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the third party shall be bound or made liable by the judgment in the action (Order 16, rr. 52, 53, 54). At the same time, the Master will have regard to the interests of the plaintiff, and not allow him to be prejudiced or delayed in his action against the defendant (*Carshore v. N.-E. Ry. Co.*, 1885, 29 Ch. at p. 346). If the Master finds that the claim made by the defendant against the third party is not strictly one either for contribution or indemnity, he will make no directions, and the third party will be released from further attendance (*Baxter v. France*, [1895] 1 Q. B. 591; *Constantin v. Warden*, 1895, 44 W. R. 162; 73 L. T. 450; *Wynne v. Tempest*, [1895] 1 Ch. 110). But it is not necessary that the contribution or indemnity claimed should go to the whole of the plaintiff's claim in the action (*Jackson v. Brown*, 1884, W. N. 23). In some cases a third party has been allowed to bring in a fourth party, from whom he claimed contribution or indemnity. As a rule, the Master, when giving directions, seeks only to bind the third party conclusively by the judgment given as between the plaintiff and the original defendants" (per Mellish, L.J., in *Treleaven v. Bright*, 1875, 45 L. J. Ch. at p. 114). But in the latest reported decision on the subject (*Seavard v. Drew; Farmer, Third Party*, 1898, 78 L. T. 19) the defendant recovered judgment against the third party for indemnity, with costs as between party and party.

VIII. CONDUCT OF THE PARTIES.

Originally, in our legal system as in every other, no regard was paid to the conduct or the motives of the parties, so long as these matters did not affect the right of action. They were allowed to enforce their legal rights without any regard to the feelings or convenience or comfort of others. The law gave the plaintiff that to which he was entitled, even though it would clearly be of no use to him, and though his conduct in asking for it was unreasonable or malicious. Then, as was inevitable, moral considerations began to intrude into the field of law. If a vindictive plaintiff rigorously insisted on his strict legal rights, he was sometimes met, as in the leading case of *Shylock*, with a still stricter technicality. This led to some straining of the law. A capricious morality fitfully asserted its claims, which tended to make one law for those whom the judge deemed "reasonably vigilant," and another law for those who seemed to him to be acting "oppressively." Hence the maxim, "Hard cases make bad law." Comp

Albert v. Grosvenor Investment Co. Ltd., 1867, L. R. 3 Q. B. 123, with *Williams v. Stern*, 1879, 5 Q. B. D. 409, and *Foakes v. Beer*, 1884, 9 App. Cas. 605. In the present day, counsel constantly tell juries, "This is an action which ought never to have been brought." And even judges are sometimes sufficiently human to be influenced by ethical considerations, which, however laudable in themselves, tend sadly to increase the so-called "uncertainty" of our law.

It is not morally wrong, however, for a man to seek his own; he may sue for nominal damages whenever he is entitled to them. A plaintiff may legitimately take proceedings to enforce his legal rights, although their infringement would inflict on him no substantial injury. The tendency of our Courts is at present too much to discourage the man who disregards his pocket and insists upon his rights. And it is "no answer, where a plaintiff asserts a legal right, for a defendant to allege his ignorance of such right, and to say, 'If I had known of your right, I should not have infringed it'" (per Jessel, M. R., in *Cooper v. Whittingham*, 1880, 15 Ch. D. at p. 504).

Nor should the Court regard the motives or reasons which lead a man to claim its protection. Most men act from mixed motives; and conduct which appears unreasonable to a learned judge may yet be justified or excused by circumstances of which he is unaware. This has been more largely recognised of late. Thus a landlord has been allowed to recover full damages for the non-repair by his tenant of houses which the landlord had already pulled down (*Rawlings v. Morgan*, 1865, 18 C. B. N. S. 776; 34 L. J. C. P. 185; *Inderwick v. Leech*, 1884, 1 C. & E. 412). A plaintiff will obtain an injunction to restrain the defendant from darkening his ancient windows, although he has himself for years kept his shutters closed (*Stokoe v. Singers*, 1857, 8 El. & Bl. 31; 26 L. J. Q. B. 257). The owner of a moor has a right to sink a well on his land, and so divert underground water from flowing on to the land of his neighbour; and he cannot be restrained from so doing, although his only object is to injure his neighbour, or to compel his neighbour to buy the moor (*Bradford v. Pickles*, [1895] App. Cas. 587; and see *Ajello v. Worsley*, [1898] 1 Ch. 274). The Court cannot "say that the plaintiff is not entitled to his legal rights merely because his object in asserting them is to obtain a higher price for his property" (per Jessel, M. R., in *In re Swire*, 1882, 21 Ch. D. at p. 654).

On the other hand, every Court has, and rightly has, a wide power of preventing any abuse of its own proceedings; it has inherent power to restrain frivolous and vexatious actions; it may even restrain actions that cannot succeed, though they are neither frivolous nor vexatious (*South Hetton Coal Co. Ltd. v. Haswell, etc., Coke Co. Ltd.*, 1898, 78 L. T. 8; C. A. 14 T. L. R. 277). Again, in all cases of unliquidated damages, the conduct of the parties very largely affects—sometimes to an illogical extent—the amount of the verdict (see DAMAGES, vol. iv. at pp. 94, 95). Lastly, on any question of costs, the conduct of the parties has a most material bearing. "Where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion, and cannot take away the plaintiff's right to costs. There may be misconduct of many sorts; for instance, there may be misconduct in commencing the proceedings, or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the Court to refuse costs" (per Jessel, M. R., in *Cooper v. Whittingham*, 1880,

15 Ch. D. at p. 504; cited with approval by Brett, M. R., in *Jones v. Curling*, 1884, 13 Q. B. D. at pp. 265, 268, and again in *O'Connor v. The Star Newspaper Co. Ltd.*, 1893, 68 L. T. at p. 147).

As to what is "good cause" for depriving a successful plaintiff of his costs, see COSTS, vol. iii. p. 476.

IX. CONDUCT OF THE PROCEEDINGS.

Questions sometimes arise as to which of several parties shall have the conduct of the proceedings. As a general rule the plaintiff is *dominus litis*; if there be more than one original plaintiff, they generally employ the same solicitor, who decides on the course to be pursued. But it often happens that several actions in which the parties, or some of them, are not identical, are consolidated; or one action may be continued as a test action, and the others stayed; and then it may be a question which plaintiff should have the management of the consolidated or test action. In case of consolidation, the plaintiff who first issued his writ is generally given the conduct of the proceedings (*Teale v. Teale*, 1882, W. N. p. 83; *The Never Despair*, 1884, 9 P. D. 34). And where H. and G., who had been plaintiffs in the two original actions which were consolidated, were made co-plaintiffs in the consolidated action, and at first employed the same solicitor, and then differed as to the proper course to be pursued; and H. obtained an order to change his solicitor, and appointed a fresh solicitor of his own, the Court made H. a defendant, and gave the conduct of the action to G., who still employed the former solicitor (*Holden v. Silkstone, etc.*, 1881, 45 L. T. 531).

In all matters relating to the administration and execution of trusts, the Court has a wide discretion. The judge may require any person to be made a party to the action, and may give the conduct of the action to such person as he may think fit, and may make such order in any particular case as he may think just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question (Order 16, r. 39). When several actions are commenced in Chancery for the administration of the same estate, the rule is to wait till one plaintiff obtains a judgment for general administration; that judgment then stands, and all further proceedings will be taken in that action; the other actions being transferred to the judge who pronounced that judgment, and then stayed. But the conduct of the proceedings in that action will be given to the plaintiff who first issued a writ, although he may not be the plaintiff who first obtained judgment (*In re Swire, Mellor v. Swire*, 1882, 21 Ch. D. 647). This rule applies to actions commenced in the Palatine Court of Lancaster, as well as to those commenced in the High Court of Justice (*ibid.*; *Townsend v. Townsend*, 1883, 23 Ch. D. 100). But the judge has a discretion in the matter; and in considering whether the rule ought to be applied or not, will have regard to the special circumstances of the case. He will take into account the amount of the interest of the plaintiff in the first action, and his object in bringing his action. The fact that a plaintiff is a stranger to the family, and that he had bought up the reversionary interests of some of the residuary legatees, is not a sufficient reason for not giving him the conduct of the proceedings, even though his purchase of some of the shares is disputed on the ground of inadequacy of consideration and undue influence (*In re Swire, supra*). But this rule will not be followed when the first action is not properly constituted, or the judgment is for any reason defective (*In re McRae*, 1883, 21 Ch. D. 16). In a proper case, *e.g.* where the plaintiff is an accounting party

the Court will give the conduct of the proceedings to the defendant who is entitled to the account (*Allen v. Norris*, 1884, W. N. p. 118; but see *Wicks v. Wicks*, 1887, W. N. p. 15). "The conduct of an action is now never given to a receiver" (per Jessel, M. R., in *In re Hopkins*, 1881, 19 Ch. D., at p. 62).

Where several actions raise the same or similar issues, and one is selected to be what is called "a test action," the plaintiff in that action will have the conduct of the proceedings, unless it is expressly provided in the order staying the other actions that the plaintiffs in these actions should have some control over the conduct of the test action. It is only fair that they should have a voice in the matter, if they desire it, as their rights are to be determined by the result of that action. Where no such provision is made in the order, the plaintiff in the action selected as the test action will be *dominus litis*. But even in that case the Court still has power to substitute another of the actions for the test action, if it appears that the one originally selected for that purpose is conducted in such a way that it will not (or did not) really determine the questions between the parties (*Amos v. Chadwick*, 1878, 9 Ch. D. 459).

So with defendants. If several different defendants are sued by the same plaintiff, *e.g.* for various infringements of the same patent, the Court will in a proper case either consolidate the actions, or select one representative case and send that for trial, so as to determine all questions, the others being stayed meanwhile (see 1 Seton, 5th ed., 556, No. 14; Daniell's *Chan. Prac.*, 6th ed., p. 1426). Under sec. 5 of the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 54), the proprietors of several newspapers, when sued by the same plaintiff for damages for the same or similar libels, can obtain an order consolidating the actions, without the consent of the plaintiff. But there is no decision at present as to which of the defendants shall have the conduct of the defence in the consolidated action; this is generally arranged between the defendants before any application for consolidation is made. In Chancery, whenever the conduct of proceedings is not given to a plaintiff, the rule is to give it to that defendant who has the largest interest at stake (*In re Hutchinson*, 1860, 1 Drew. & Sm. 27, 30; 6 Jur. N. S. 136).

Partition.

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Partition generally.—Definition.—Partition is a division between owners (whether coparceners, joint tenants, or tenants in common) lands, tenements, and hereditaments held by them, the effect of such division being that the joint ownership is terminated, and the shares of the parties vested in them in severalty.

What may be partitioned.—All hereditaments of whatever kind, corporeal or incorporeal, are capable of being partitioned, except such as are by their nature indivisible (*Co. Litt.* 164 *b*). Thus freeholds; copyholds (4 & 5 Vict. c. 35, s. 83; 57 & 58 Vict. c. 46, s. 87); leaseholds (*Hen. VIII. c. 32*; *Baring v. Nash*, 1813, 1 Ves. & Bea. 551); tithes (*Barr v. Knollys*, 1750, 1 Ves. 494); rent charges (*Rivis v. Watson*, 1839, 5 M. & W. 253); manors (*Hanbury v. Hussey*, 1851, 14 Beav. 153); advowsons (*Johnstone v. Baber*, 1856, 6 De G., M. & G. 439; *Bodicoote v. Steers*, 1711, 1 Dick. 69; *Mattheus v. Bishop of Bath and Wells*, 1785, 2 Dick. 652), may be partitioned. As regards advowsons, by 7 Anne, c. 18, if coparceners, joint tenants, or tenants in common, are seised of any estate of inheritance in an advowson, and a partition is made between them to present by turn, each is seised of a separate estate.

Lord Coke points out certain hereditaments which, being indivisible, cannot be partitioned, as a piscary uncertain or common *sans nombre*, homage, and fealty, and inheritances of dignity and honour. In respect of such inheritances, modes of partition were devised by which either the indivisible inheritance was awarded to one party, the other having an equivalent in other portions of the joint estate, or alternate enjoyment was given to the several co-owners.

A villein is an inheritance indivisible in its own nature, yet if he descend to coparceners, the profit of him may be divided; as one of them may have the service him one day, one week, or the like, and the other another day, week, etc.

Again—

Reasonable estovers, as house-bote, haybote, etc., appendant to a freehold; corrodian uncertain granted to a man and his heirs; a piscary uncertain; or common *sans nombre* cannot be divided between coheirs, because a partition of them would enlarge the original grant beyond the intention of the grantor, and likewise prove a greater charge than was originally intended to the tenant of the soil; but the manner of enjoying the among coheirs is commonly settled on the following method: If any other inheritance descends to them besides, then the eldest only shall take them, and the rest shall have contribution or allowance in value out of the other inheritance which descended to them; but if no other inheritance descended to them, then one shall take the estovers, piscary, etc., for a fixt time, as a month, a year, etc., and the others for a like time after, who will effectually secure the owner of the soil from any prejudice; or, in case of a piscary, one may have the first fish, the other the second, etc.; or one of them may have the first draught, the other the second, etc.

(*Co. Litt.* 164 *b*, 165 *a*; *Bac. Abr.* tit. "Coparceners" (C); and see further Foster, pp. 83–89; Lawrence, pp. 12–21.)

How Partition effected.—A partition may be effected in the following ways: (1) by agreement between the parties; (2) or it may be compelled against the wish of some of the co-owners by means of an action for partition; or (3) an order for partition may be obtained from the Board

Agriculture, in which body is now vested the powers conferred by various statutes on the Inclosure Commissioners.

A. VOLUNTARY PARTITION.

Parties must be Competent.—It is essential to a voluntary partition that the parties should be *sui juris*, and capable of entering into the agreement. Various statutory enactments have greatly facilitated such dealings with property held by co-owners.

Powers under Settled Land Acts.—Under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 3 (iv.), where the settlement comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares, a tenant for life may concur in making partition of the entirety of the estate, including a partition in consideration of money paid for equality of partition, subject to the qualification that every partition must be for the best consideration in land, or in land and money, that can reasonably be obtained (s. 4 (2)).

Where money is required for equality of partition, the tenant for life may raise the same on mortgage of the settled land (s. 18). Where the settled land comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares, the tenant for life of an undivided share may join or concur with any person entitled to or having power or right of disposition of or over another undivided share (s. 19).

Notice of an intention to partition must be given to the trustees of the settlement in the prescribed manner (s. 45 (1)).

Where a tenant for life, or a person having the powers of a tenant for life, is an infant, the powers of a tenant for life under the Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, orders (s. 60).

Where a partition is to be made with the tenant for life of land, an undivided share whereof is subject to the limitations of the settlement, the trustees of the settlement stand in the place of and represent the tenant for life, and, in addition to their powers as trustees, have all the powers of the tenant for life in reference to negotiating and completing the transaction (Settled Land Act, 1890 (53 & 54 Vict. c. 69, s. 12)).

Deed necessary.—By the Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 3, a partition of any tenements or hereditaments, not being copyhold, is void at law, unless made by deed.

At common law, coparceners might have made partition of things lying in livery or grant by parol without deed; and tenants in common might have made partition of things lying in livery by parol without deed, if they afterwards perfected the partition by livery of seisin. Joint tenants for years might have made partition by parol without deed. But joint tenants of freeholds, whether corporeal or incorporeal, and tenants in common of incorporeal hereditaments, could not have made partition without deed. Since the Statute of Frauds (29 Car. II. c. 3), a writing was in all cases necessary, but a deed was only required in cases in which it was necessary before that statute.

(*Co. Litt.* 169 a, 187 a; *Shelford's Real Property Statutes*, p. 486.)

As to the form of deeds of partition, see *Foster*, pp. 94–101.

Confirmation of Sales Act.—Under the Confirmation of Sales Act, 1862 (25 & 26 Vict. c. 108), s. 2, trustees authorised to dispose of land by way (*inter alia*) of partition may, unless forbidden by the instrument creating the trust or power, so dispose of such land with an exception or reservation of any minerals, and with or without rights and powers of or inci-

dental to the working, getting, or carrying away of such minerals, or may dispose of, by way (*inter alia*) of partition, the minerals with or without such rights or powers separately from the land; and in either case, without prejudice to any future exercise of the authority with respect to the excepted minerals, or (as the case may be) the undisposed of land. No such disposition, however, is to be made without the previous sanction of the Chancery Division, to be obtained on petition in a summary way.

Lunacy Act, 1890.—Under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), the judge in lunacy may, by order, authorise and direct the committee of the estate of a lunatic to make partition of any property belonging to the lunatic, or in which he is interested, and give or receive any money for equality of partition (s. 120 (b)).

Power of Sale and Exchange.—A power of sale and exchange authorises a partition (*In re Firth & Osborne*, 1876, 3 Ch. D. 618).

B. PARTITION BY THE COURT.

The second mode of effecting a partition, namely, by judicial process, requires a more minute consideration.

Common Law Right.—All co-owners alike could agree amongst themselves to partition of the estate in which they were jointly interested; but by the common law the right to compel partition was confined to parceners. "Joyntenants, if they will may make partition between them, and the partition is good enough; but they shall not be compelled to do this by the law; but if they will make partition of their own will and agreement, the partition shall stand in force" (Litt. s. 290). Littleton (s. 24) has it, that parceners derived their name from the writ *de participatione faciendâ*, the word "*participatione*" being, according to Lord Coke, a misprint for "*partitione*" (*Co. Lit.* 164 b). The right to a writ of partition was by 31 Hen. VIII. c. 1 extended to joint-tenants and tenants in common of any estate or estates of inheritance, and a further statute, 3 Hen. VIII. c. 32, s. 1, provided that joint-tenants and tenants in common for lives or years should be compellable to make partition.

Concurrent Jurisdiction in Chancery.—The common law writ proved to be a cumbrous and unsatisfactory method of procedure, and from an early period the Court of Chancery, in the exercise of its concurrent jurisdiction, entertained suits for partition, which were carried out by a commission addressed to commissioners, and not, as at law, by writ addressed to the sheriff. "The Court issues the commission, not under the authority of any Act of Parliament, but on account of the extreme difficulty attending the process of partition at law, where the plaintiff must prove his title as he declares, and also the title of the defendants; and judgment is given for partition according to the respective title so proved. That is attended by so much difficulty, that by analogy to the jurisdiction of a Court of equity in the case of a dower, partition may be obtained by bill" (per Eldon L.C., *Agar v. Fairfax*, 1810, 17 Ves. 533; Wh. and T. *Leading Cases*, vol. i. p. 181; and see *Mundy v. Munday*, 1793, 2 Ves. Jun. 124; *Calmady v. Calmady*, 1795, 2 Ves. Jun. 569).

In *Manners v. Charlesworth*, 1833, 1 Myl. & K. 330, it was said that there was no trace of the exercise of the jurisdiction in Chancery before the 40 Eliz., and that it was of rare and uncertain use as late as the reign of Charles I. In *Whaley v. Dawson*, 180. 2 Sch. & Lef. 371, it was stated that the difference between partition at law and in equity was that the former operated by the judgment of a Court of law, conclusively between the parties, whilst the latter proceeded on conveyances to be executed between the parties.

Abolition of Writ.—At length, by the Real Property Amendment Act, 1833 (3 & Will. IV. c. 27), s. 36, the writ *de participatione faciendâ* was abolished, and thenceforward the Courts of equity had exclusive, instead of merely concurrent, jurisdiction in partition.

Copyholds.—Copyholds were not originally partitionable by decree of the Court (*Co. Litt.* 59 a (n), 187 a (n.); *Jope v. Morshead*, 1843, 6 Beav. 213; *Horncastle v. Charlesworth* 1840, 11 Sim. 315), though specific performance would be enforced of an agreement between joint-tenants of copyholds to divide the land and hold the respective parts in severalty (*Bolton v. Ward*, 1845, 4 Ha. 530). The Copyhold Act, 1841 (4 & 5 Vic. c. 35), s. 85, gave power to the Court to decree partition of copyholds. That Act repealed by the Copyhold Act, 1894 (57 & 58 Vict. c. 46), by sec. 87 of which last-named Act it is provided that in an action for partition of land, of copyhold or customary

tenure, the like order may be made as may be made with respect to land of freehold tenure.

Partition of right.—If the title of the plaintiff was clear, he was entitled to a decree for partition as of right.

Smallness of interest, difficulty, inconvenience, or reluctance of other co-owners were no objection to the exercise of the jurisdiction by the Court (*Baring v. Nash*, 1813, 1 Ves. & Bea. 536; *Manaton v. Squire*, 1677, 2 Ch. Cas. 237; *Parker v. Gerard*, 1754, Amb. 236); though there was a discretion to refuse partition on a suspicious title (*Baring v. Nash*). The result was in many cases grave and even absurd inconvenience. Thus, in a case which has been often cited, a decree was granted for partition of a single house amongst three persons. The commissioners allotted to the plaintiff the whole stack of chimneys, all the fireplaces, the only staircase, and all the conveniences in the yard. The Lord Chancellor, in overruling an exception taken by the defendant, said that he did not know how to make a better partition for the parties. He had granted the commission with great reluctance, but was bound by authority, and it must be a strong case to induce the Court to interfere, as the parties ought to agree to sell (*Turner v. Morgan*, 1803, 8 Ves. 143; 11 Ves. 157 n.; see also *Warner v. Baynes*, 1750, Amb. 589).

Partition Act, 1868.—The common law right to a partition still exists (*Mayfair Property Co. v. Johnstone*, [1894] 1 Ch. 508). But it is controlled by the provisions of the Partition Act, 1868 (31 & 32 Vict. c. 40), which has done much to remedy the abuses which existed under the old system, by conferring on the Court power to order a sale in lieu of partition where the justice of the case demands it.

The general object and effect of the Act, and the evils at which it was aimed, will be found nowhere better stated than in the judgment of Hatherley, L.C., in *Pemberton v. Barnes*, 1871, L. R. 6 Ch. 685.

Action thereunder, where to be brought.—It will be necessary to discuss with some detail the provisions of the Act, and of the amending statute, the Partition Act, 1876 (39 & 40 Vict. c. 17). Before doing so, however, it may be stated that an action under them must be brought in the Chancery Division (Partition Act, 1868, s. 2), and see sec. 34 (3) of the Supreme Court of Judicature Act, 1873, under which all causes or matters for the partition or sale of real estates are assigned to that Division of the High Court.

The Court of Chancery in Ireland, the Landed Estates Court in Ireland, and the Court of Chancery of the County Palatine of Lancaster, within their respective jurisdictions, are comprised in the term "The Court," as used in the Act, and by the Palatine Court of Durham Act, 1889 (52 & 53 Vict. c. 47), s. 10, it is extended to the Court of Chancery of the County Palatine of Durham.

Jurisdiction is also conferred on County Courts in England, where the property to which the action relates does not exceed in value £500 (s. 12).

General Effect of Act.—The main provisions of the Act, enabling the Court to order a sale in lieu of partition, are contained in secs. 3, 4, 5.

Stated shortly, the effect of those sections is as follows:—

In a suit for partition, where before the Act a decree for partition might have been made, the Court, on the request of parties interested, may direct a sale in the following cases:—

(a) Where, by reason of the nature of the property, or of the number of persons interested, or of the absence or disability of some of the parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between them; and that notwithstanding dissent or disability of some of the parties (s. 3).

(b) Where the parties interested to the extent of one moiety or upwards request a sale (s. 4).

(c) Where a party interested requests a sale, the Court may direct it, unless the other parties, or some of them, undertake to purchase the share of the requesting party, and in case of such undertaking a value of the share may be ordered (s. 5).

It will be seen that the foundation of the jurisdiction conferred on the Court is the right to partition. Two main things are essential—

1. The action must be one in which partition can be ordered.
2. There must be a request by some party or parties interested that the Court will direct a sale.

Partition need not be prayed.—Under the words, “in a suit for partition which preface each of the three sections, it was formerly held that, even where the sole object of the suit was a sale, a partition must nevertheless have been prayed (*Teall v. Watts*, 1871, L. R. 11 Eq. 213; *Holland v. Holland*, 1872, L. R. 13 Eq. 406); but this is no longer necessary, for by sec. 7 of the Partition Act, 1876, it is provided that an action for partition shall include an action for sale and the distribution of the proceeds, and in an action for partition it shall be sufficient to claim a sale and distribution of the proceeds, and it shall not be necessary to claim a partition.

Who may sue.—The parties entitled to bring an action under the Act are, by the express terms of it, such as under the previous practice would have been entitled to a decree for partition. No new power, therefore, is conferred on the Court to entertain an action in cases where before the Act no such power existed. It follows from the authorities that the plaintiff must be a co-owner having an interest in possession, as, *e.g.*, a tenant in tail (*Brook v. Hertford*, 1728, 2 P. Wms. 518); or for life (*Gaskell v. Gaskell*, 1836, Sim. 643); or for an interest determinable on marriage (*Hobson v. Sherwood*, 1841, 4 Beav. 184); but a remainderman or reversioner cannot successfully maintain an action (*Evans v. Bagshaw*, 1870, L. R. 5 Ch. 340). A tenant in common who has mortgaged his share to another tenant in common cannot bring an action to enforce partition of the entirety against his mortgagee except upon the terms of paying off the mortgage (*Gibbs v. Haydon*, 1883, 30 W. R. 726; *Sinclair v. James*, [1894] 3 Ch. 554); but a tenant in common of an equity of redemption can sue (*Waite v. Bingley*, 1882, 21 Ch. D. 674). Where there are overriding trusts (*Taylor v. Grange*, 1880, 15 Ch. D. 165) or an existing trust for sale (*Biggs v. Peacock*, 1882, 22 Ch. D. 284), an order will be refused; nor is there jurisdiction to anticipate the period fixed by testator for distribution (*Swaine v. Denby*, 1880, 14 Ch. D. 326). But a mere discretionary power to sell is no bar to the exercise of the jurisdiction (*Boyd v. Allen*, 1883, 24 Ch. D. 622).

A person of unsound mind not so found can bring an action for partition by his next friend (*Watt v. Leach*, 1878, 26 W. R. 475; *Porter v. Porter*, 1887, 37 Ch. D. 420).

Section 3.—

The 3rd section gives power to the Court to sell for certain reasons. These reasons are specified in every case but one. The reasons specified are, the nature of the property, the number of the parties interested, the absence or disability of some of the parties. The reasons are unspecified only in one case, namely, where by reason “of any other circumstance” a sale of the property and distribution of the proceeds would be more beneficial to the parties interested than a division of the property between or among them. Whenever that happens, and any party interested applies for a sale, the Court may direct a sale. It is an absolute power of sale, on the request of anybody, provided the Court is satisfied that it would be more beneficial for the parties interested than a division.

(Per Jessel, M.R., *Drinkwater v. Ratcliffe*, 1875, L. R. 20 Eq. 528.) In the case a sale was directed on account of the nature of the property, the number of the parties interested, and because in the opinion of the Court a sale would be more beneficial to the parties interested than a division among them. The Court is at liberty, at the request of a party holding one-tenth and against the wish of the persons holding the other nine-tenths, to order

a sale, if from the nature of the property, or from the number of the persons interested, the Court thinks it right or reasonable so to do (*Pemberton v. Barnes*, 1871, L. R. 6 Ch. 685).

In considering whether a sale is beneficial, the Court will have regard to the benefit of all the parties interested (*Powell v. Powell*, 1874, L. R. 10 Ch. 130). And the benefit must be a pecuniary, and not a merely sentimental one (*Drinkwater v. Ratcliffe*).

There is full discretion in the Court under the section; the onus lies upon the owners of the smaller share desiring a sale to show that under all the circumstances a sale is the more beneficial course for all parties. Where it does not appear that a division cannot reasonably be made, a sale should not be directed, in the absence of other circumstances to give the jurisdiction (*Allen v. Allen*, 1885, 21 W. R. 842). And this discretion will not ordinarily be interfered with by the Court of Appeal (S. C.). See, too, *In re Dyer*, *Dyer v. Painter*, 1885, 33 W. R. 806; *Gilbert v. Smith*, 1879, 11 Ch. D. p. 81.

Section 4.—

The 4th section provides that if the parties interested, to the extent of a moiety or upwards, request a sale, the Court shall sell, unless it sees good reason to the contrary—that is, irrespective of the nature of the property, irrespective of the number of persons, irrespective of absence or disability, irrespective of any special circumstances which make the Court think it beneficial. The parties interested to the extent of one moiety are entitled to a sale as of right, unless there is some good reason to the contrary shown; they have not to show any reason for the sale, but a reason to the contrary must be shown.

(Per Jessel, M. R., *Drinkwater v. Ratcliffe*, 1875, L. R. 20 Eq. 528.)

Whereas under the 3rd section a discretionary power was given to the Court to order a sale if it thought a sale more beneficial than a partition, the 4th section makes it imperative on the Court to order a sale unless it sees good reason to the contrary, that is to say, the onus is thrown on the person who says that the Court ought not to order a sale, to show some good reason why it should not do so, otherwise the Court is bound to order it. The scope of the enactment appears to me to be this: There being, as I have said, reasons which may induce some of the part-owners to wish for a partition, and others to wish for a sale and a division of the proceeds, the Legislature says that, if the votes are equally divided, one half of the persons interested in the property desiring a sale, and the other half a partition, then the half requiring a sale shall have the preponderating voice, and the Court shall be bound to give them a sale, wholly irrespective of the 3rd section. But still there is a certain discretion left in the Court, so that the Court can refuse a sale where it is manifestly asked for through vindictive feeling, or is on any other ground unreasonable. . . . If the Court finds that the parties entitled to a moiety or upwards desire a sale, the Court must order it, unless some good reason is shown to the contrary.

(Per Hatherley, L. C., *Pemberton v. Barnes*, 1871, L. R. 6 Ch. 685.) See also *Lys v. Lys*, 1868, L. R. 7 Eq. 126; *Wilkinson v. Joberns*, 1873, L. R. 16 Eq. 14; *Rowe v. Gray*, 1876, 5 Ch. D. 263; *Porter v. Lopes*, 1877, 7 Ch. D. 358; *Langmead v. Cockerton*, 1877, 25 W. R. 316; *Roughton v. Gibson*, 1877, 25 W. R. 269.

Onus on Parties opposing Sale.—Under this section, therefore, the onus is on those who oppose a sale to show the existence of special circumstances which should induce the Court to exercise the discretion reposed in it in the direction of refusing a sale. In the absence of such special circumstances, a sale is a matter of right. That is to say, the onus, which under the 3rd section is on those who desire a sale, is by the 4th section shifted, and laid on those who oppose a sale.

It would be striking the section out of the Act to say that the owners of a moiety have no more to do than to come and say, “We do not wish for a sale.” The Legislature

has said that there shall be a sale if the owner of one moiety asks for it, unless good reason is shown to the contrary.

(*Pemberton v. Barnes*, 1871, L. R. 6 Ch. p. 694.)

Where it was proved that a partition would be as feasible as a sale, and that a partition would cause no loss to the plaintiff, whilst a sale would greatly damage the defendant, and that a vindictive feeling on the part of the plaintiff had brought about the action, it was held that these circumstances constituted "good reason to the contrary," and a sale was refused, a partition being directed instead (*Saxton v. Bartley*, 1879, 27 W. R. 615 and see the remarks of Jessel, M. R., in *Porter v. Lopes*, 1877, 7 Ch. L. pp. 363, 366).

Section 5.—This section is for the benefit of those part-owners who want to have a sale, in which case the other parties interested, who object to a sale, may be compelled to buy the shares or have a sale. But there is nothing to compel a man to sell his share (*Williams v. Games*, 1875, L. R. 10 Ch. 204; *Pitt v. Jones*, 1880, 5 App. Cas. 651). The section does not qualify or control sec. 3, nor operate as a proviso upon it; so that a party asking for a sale cannot be compelled to part with his share on a valuation (*Pitt v. Jones*). It was suggested in *Pemberton v. Barnes* (1871, L. R. 6 Ch. 685) that the section was in effect a proviso to the 3rd and 4th sections; but in *Drinkwater v. Ratcliffe* (1875, L. R. 20 Eq. 531) that view was dissented from by Jessel, M. R., who held that the power conferred by the 5th section was a new power given to any party, whether plaintiff or defendant, to apply, with or without any reason whatever, to the Court for a sale, and that he is entitled to ask for it, unless somebody is going to buy, and then *Williams v. Games* says that if he does apply for it, and somebody does offer to buy his share, he may withdraw his request. If a party presses for a sale, and the Court thinks that the opposing parties, in fairness, ought either to buy him out or consent to a sale, it may order a sale, unless they will agree to take his share at a valuation, in which case the party requesting a sale may either accept that valuation or not. If he does not choose to accept that valuation, he cannot be forced to do so, but will then have his common law right to a partition. But the party declining to accept the undertaking for a valuation is not prevented from pressing for a sale under the other sections of the Act, if he can bring himself within them (*Pitt v. Jones*, *ubi supra*).

The Court is not bound to order a sale, even if none of the parties undertake to purchase the applicant's share; but the onus is on the applicant to show some good reason why a sale should be ordered (*Richardson v. Feary*, 1888, 39 Ch. D. 45). If a case is not made out under sec. 3, the defendant will be given the right of purchasing under sec. 5, unless the plaintiff accepts a partition instead of a sale (*Evans v. Evans*, 1883, 3 W. R. 495).

Leave to bid.—By sec. 6 of the Partition Act, 1868, the Court may allow any of the parties interested to bid at the sale, on such terms as to non-payment of deposit, or as to setting off or accounting for the purchase money or any part thereof instead of paying the same, or as to any other matters, as to the Court may seem reasonable.

It is unusual to give leave to bid to the party conducting the sale (*Sidney v. Ranger*, 1841, 12 Sim. 118; *Ex parte M'Gregor, In re Laird*, 1851 4 De G. & Sm. 603). It was, however, done in *Pennington v. Dalbiac*, 1870 18 W. R. 684; but see *contra*, *Verrall v. Cathcart*, 1879, 27 W. R. 645.

Where a party interested in the property is declared the purchaser, h

will be ordered to pay into Court a proportion only of the purchase-money, being allowed to deduct the amount of his share of the purchase-money, less a proper sum as his contribution to meet the costs (*Wilkinson v. Joberns*, 1873, L. R. 16 Eq. 14; *Roughton v. Gibson*, 1877, 25 W. R. 269). Beneficiaries, who were allowed to bid, and to set off a part of the purchase-moneys against their respective shares, were charged with interest at the rate of 3 per cent. on the sums so set off (*In re Dracup*, *Field v. Dracup*, [1894] 1 Ch. 59).

Vesting Order under Trustee Act.—Under the Trustee Act, 1893 (56 & 57 Vict. c. 53), which repealed sec. 7 of the Partition Act, 1868, where a judgment is given for the partition, or sale in lieu of partition, of any land, the Court may declare that any of the parties to the action are trustees of the land within the meaning of the Act, or may declare that the interests of unborn persons who might claim under any party to the action, are the interests of persons who, on coming into existence, would be trustees within the meaning of the Act, and thereupon the Court may make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees (sec. 31, replacing sec. 30 of the Trustee Act, 1850 (13 & 14 Vict. c. 60)).

It was held that the only object of the 7th section of the Partition Act, 1868, which incorporated sec. 30 of the Trustee Act, 1850, was to transfer the legal estate (per Jessel, M. R., *Basnett v. Moxon*, 1875, L. R. 20 Eq. 182; and see *Lees v. Coulton*, 1875, L. R. 20 Eq. 20). Sec. 1 of the Trustee Extension Act, 1852 (15 & 16 Vict. c. 55), now replaced by sec. 30 of the Trustee Act, 1893, applied to sales under the Partition Acts, and was not limited to cases of persons under disability (*Beckett v. Sutton*, 1882, 19 Ch. D. 646). For an order declaring infants trustees in the event of a sale for the purchaser, and for conveyance by their next friend, see *Davis v. Ingram*, [1897] 1 Ch. 477. See further, as to the 7th section, Walker, pp. 41, 42; Shelford, p. 516; Morgan, p. 78.

Application of Proceeds of Sale.—By sec. 8 of the Partition Act, 1868, secs. 23–25 of the Settled Estates Act, 1856 (19 & 20 Vict. c. 120), are to extend and apply to money to be received on any sale effected under the Act. These sections are replaced by secs. 34–36 of the Settled Estates Act, 1877 (40 & 41 Vict. c. 18).

Judgment for Sale, how far a Conversion.—A judgment for sale in a partition action converts the shares of parties not under disability who die before the sale (*Arnold v. Dixon*, 1874, L. R. 19 Eq. 113; *Steed v. Preece*, 1874, L. R. 18 Eq. 192); but the incorporation of these sections into the Act has the effect of creating an equity for reconversion of the purchase-money into land in the case of persons under disability (*Foster v. Foster*, 1875, 1 Ch. D. 588; and see *Mildmay v. Quicke*, 1877, 6 Ch. D. 553; *Mordaunt v. Benwell*, 1881, 19 Ch. D. 302; *In re Barker*, 1881, 17 Ch. D. 241). An order for sale, however, made upon request, under sec. 6 of the Partition Act, 1876, on behalf of parties under disability (*Wallace v. Greenwood*, 1882, 16 Ch. D. 362; and see *Hyett v. Mekin*, 1884, 25 Ch. D. 735) operates as a conversion.

Parties to Action.—By sec. 9 of the Partition Act, 1868, it was in effect provided that—

any person, who might before the Act have maintained a suit for partition, may maintain such suit against any one or more of the parties interested without serving the others; and at the hearing the Court may direct such inquiries as to the nature of the property, and the persons interested therein, and other matters, as it thinks necessary or proper, with a view to an order for partition or sale being made on further considera-

tion; but all persons who before the Act would have been necessary parties must be served with notice of the judgment, and after service will be bound by the proceeding, as if they had been originally parties to the suit; and all such persons may have liberty to attend the proceedings; and any such person may, within a time limited by general order, apply to the Court to add to the judgment.

Necessary Parties.—The legal estate should, as a rule, be before the Court (*Miller v. Warmington*, 1820, 1 Jac. & W. 493; 21 R. R. 217). But inasmuch as a partition does not affect the rights of third parties, a mortgagee of the entirety need not be made a party or served with notice of the judgment (*Swan v. Swan*, 1819, 8 Price, 518; 22 R. R. 770). It is, however, necessary to join a mortgagee or lessee of an undivided share (*Watkin v. Williams*, 1851, 3 Mac. & G. 622; *Cornish v. Gest*, 1788, 2 Co. 27).

For the purpose of proceedings in partition trustees sufficiently represent their *cestuis-que trustent* (*Stace v. Gage*, 1878, 8 Ch. D. 451; *Simpson v. Denny*, 1878, 10 Ch. D. 28; R. S. C., 1883, Order 16, r. 8).

The plaintiff must state with sufficient clearness and precision his own title (*Jope v. Morshead*, 1843, 6 Beav. 213); but a general allegation of the titles of the defendants is sufficient (*Baring v. Nash*, 1813, 1 Ves. & B. 551; *Cartwright v. Pulteney*, 1742, 2 Atk. 380). It is, of course, essential that the titles of all parties should spring from one common root. For there can be no partition between persons having distinct or adverse titles as independent owners (*Miller v. Warmington*, 1820, 1 Jac. & W. 493). See Lawrence, p. 61.

Result of Section 9.—The result of sec. 9 of the Act of 1868 is as follows:—

(1) No order for sale will be made at the hearing, unless all parties interested are before the Court, and the title proved (*Mildmay v. Quicke*, 1875, L. R. 20 Eq. 537; *Lees v. Coulton*, 1875, L. R. 20 Eq. 20).

(2) A sale will not be ordered at all, unless and until every person interested is a party to the action, or has been served with notice of the judgment, and is bound (*Peters v. Bacon*, 1869, L. R. 8 Eq. 125; *Hurry v. Hurry*, 1870, L. R. 10 Eq. 346); or unless there has been an order dispensing with service under sec. 3 of the Partition Act, 1876.

Title not generally proved at the Hearing.—As a rule, the title should not be proved in the first instance, unless the property is small and the title simple (*Hawkins v. Herbert*, 1889, 37 W. R. 300; *Wood v. Gregory*, 1889, 43 Ch. D. 82; *In re Stedman*, *Combe v. Vincent*, 1888, 58 L. T. 709; *Willis v. Willis*, 1889, 38 W. R. 7).

Form of Judgment directing Inquiries.—Where at the hearing the title is not proved, the judgment will direct an inquiry as to the parties interested, and for what estates and interests, and in what shares and proportions, and whether they are parties to the action; and will order the property to be sold, if it shall be certified that all the persons interested are parties. If, however, it should appear, as the result of the inquiries, that all persons interested are not parties, liberty is given by the judgment to apply at chambers for a sale, so soon as it shall have been certified that all persons who are not parties and ought to be served with notice of the judgment have been so served, and are bound (*Mildmay v. Quicke*, 1875, L. R. 20 Eq. 537; *Sykes v. Schofield*, 1880, 14 Ch. D. 629; and see Seton pp. 1533 *et seq.*).

Further Consideration.—The words “further consideration” in sec. 9 are used in a popular sense, and an application in chambers for sale fulfils the requirement of the section (*Powell v. Powell*, 1874, L. R. 10 Ch. 130; *Mildmay v. Quicke*, 1875, L. R. 20 Eq. 537). A sale before certificate find

ing the parties is irregular, and a purchaser thereunder will be discharged (*Powell v. Powell*); but where all the parties interested were in fact before the Court at the hearing, and were willing to convey, and a good title could be made independently of the Partition Act, 1868, it was held that the purchaser was bound to accept the title, and could not rely on a technical defect in the judgment (*Rawlinson v. Miller*, 1875, 1 Ch. D. 52).

Inquiries may be directed to be taken in a district registry, but the application for sale should be made in the chambers of the judge to whom the action is assigned (*Sykes v. Schofield*, 1880, 14 Ch. D. 629).

Power to dispense with Service.—In consequence of the difficulties resulting from the necessity for serving all parties with notice of the judgment before the Court would entertain an application for sale, it was in effect provided by sec. 3 of the Partition Act, 1876, that where it appears to the Court that notice of the judgment cannot be served on all necessary parties without expense disproportionate to the value of the property, the Court may by order dispense with service on any person or class of persons specified in the order, and may instead thereof direct advertisements to be published, calling upon all persons claiming to be interested in the property, who have not been served, to come in and establish their claims. After the time limited, all persons who have not come in and established their claims, whether they are within or without the jurisdiction, will be bound by the proceedings; and the Court may thereupon direct a sale of the property, and give all necessary consequential directions. For form of order, see *In re Hardiman, Pragnell v. Batten*, 1880, 16 Ch. D. 360.

There is no power to dispense with advertisements in cases where service of notice of the judgment is dispensed with (*Hacking v. Whalley*, 1882, 51 L. J. Ch. 944; *Phillips v. Andrews*, 1887, 35 W. R. 266), except in the case of parties with no beneficial interest (*Crossman v. Richards*, 1888, W. N. 167).

Proceedings where Service dispensed with.—Where, under sec. 3, service of notice of the judgment is dispensed with, the following provisions must be complied with:—

- (1) The proceeds of sale must be paid into Court.
- (2) The Court must by order fix a time within which the proceeds are to be distributed.
- (3) Notice by advertisement or otherwise must be given, notifying to the persons on whom service is dispensed with the time of the intended distribution and the time within which a claim to participate in the proceeds must be made.
- (4) If at the expiration of such time the interests of all persons interested have been ascertained, the Court will distribute the proceeds.
- (5) If, however, they have not been ascertained, and cannot be ascertained without expense disproportionate to the value of the property, the Court will distribute the proceeds in such manner as appears to be most in accordance with the rights of the parties whose claims have been established, whether they be before the Court or not, and with such reservation (if any) as to the Court may seem fit in favour of other persons (whether ascertained or not), who may appear from the evidence to have any *prima facie* rights which ought to be provided for, although not fully established, but to the exclusion of all other persons, and thenceforth all such persons will be excluded from participation. Notwithstanding distribution, any person excluded may recover from any participating person any portion received by him of the share of the excluded person (s. 4).

Case of Successive Sales.—By sec. 5, in the case of two or more sales, if a person excluded from participating in the distribution of proceeds of a former sale establishes his claim to participate in the proceeds of a sub-

sequent sale, the shares of the other parties must abate to the extent by which they were increased by the non-participation of the excluded person in the previous distribution, and will be applied in or toward payment of the share of such excluded person.

The above provisions are at once costly and dilatory, and, according to the experience of the present writer, the cases in which they have been resorted to are not numerous. Under sec. 5 of the Judicature Act, 1894 (57 & 58 Vict. c. 16), the power to make rules conferred by the Judicature Acts, 1873 to 1891, includes power to make rules with respect to the matters contained in the Partition Acts, 1868 and 1876. No such rules have at present been made; and it is apprehended that nothing short of legislation can modify express statutory provisions.

Request for Sale.—By sec. 6 of the Partition Act, 1876, a request for sale may be made or an undertaking to purchase may be given on the part of a married woman, infant, person of unsound mind, or person under any other disability, by the next friend, guardian, committee in lunacy (if authorised by order in lunacy), or other person authorised to act on behalf of the person under disability; but the Court is not bound to comply with any such request or undertaking on the part of an infant, unless it appear that the sale or purchase will be for his benefit.

In *Wallace v. Greenwood*, 1882, 16 Ch. D. 362, Jessel, M. R., said that the request on behalf of a married woman should be made by a person specially authorised to act on her behalf in the action. In *Grange v. White* (1882, 18 Ch. D. 612), Hall, V.C., required that there should be a request signed by her, authorising and requesting her solicitor to ask for a sale.

"Of course, the provisions of this section only apply to cases where the married woman's share is neither her separate property nor affected by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), in either of which cases she can deal with it as a *feme sole*" (Dart's *Vendors and Purchasers*, p. 1308).

The request on behalf of an infant may be made by his next friend or guardian *ad litem* (*Rimington v. Hartley*, 1880, 14 Ch. D. 630). Person of unsound mind may sue by their next friends (*Porter v. Porter*, 1887, 37 Ch. D. 420; and see *Watt v. Leach*, 1878, 26 W. R. 475). Under the Lunacy Act, 1890 (53 & 54 Vict. c. 5, s. 120), the judge in lunacy may authorise and direct the committee of the estate to make partition of any property belonging to a lunatic or in which he is interested, and to give or receive any money for equality of partition.

As to the effect of a sale effected upon request under this section with regard to a conversion of the sale proceeds, see *Wallace v. Greenwood*, 1882, 16 Ch. D. 362, and other cases cited, *supra*, p. 445.

Partition may be ordered.—The effect of the Partition Act, 1868, has been largely to diminish the number of cases in which partition has been ordered, the remedy by sale having been found to be generally the more convenient one to the parties. But, in a proper case, a judgment for partition will still be made; and that even though the Master has found by his certificate that a sale will be more beneficial (*Allen v. Allen*, 1873, 2 W. R. 842). And an order may be made for partition of part of the estate and sale of the rest (*Roebuck v. Chadebert*, 1869, L. R. 8 Eq. 127; *Pennington v. Dalbiac*, 1870, 18 W. R. 684). It was decided long before the Act that partition might be confined to the aliquot share of one of the parties, if the others did not desire that their shares should be partitioned (*Hobson v. Sherwood*, 1841, 4 Beav. 184).

Where a partition is ordered, it may be carried out either by commission or by a reference to chambers. A commission of partition, however, if not obsolete, is now of extreme rarity. For the practice, see Daniell's *Ch. Pr.* pp. 1336–1344.

Sale out of Court.—In all cases where (*inter alia*) a sale or partition is ordered, the Court has power, with a view to saving expense and delay, and for other good reason, to authorise the same to be carried out altogether out of Court, any monies produced thereby being paid into Court or to the trustees, or otherwise dealt with as the judge in chambers may order. But such proceedings out of Court are not to be sanctioned, unless the judge is satisfied by evidence that all persons interested in the estate to be sold or partitioned are before the Court, or are bound by the order for sale or partition; and every order authorising such proceedings out of Court is to be prefaced by a declaration that the judge is so satisfied, and a statement of the evidence upon which such declaration is made (R. S. C., 1883, Order 51, r. 1A).

The usual order under the above rule is that the reserved biddings and auctioneer's remuneration be fixed by the Court, and the purchase-money paid directly into Court (*Pitt v. White*, 1887, 57 L. T. 650; *In re Stedman, Combe v. Vincent*, 1888, 58 L. T. 709; *Willis v. Willis*, 1889, 38 W. R. 7; *Wood v. Gregory*, 1889, 43 Ch. D. 82). In an earlier case, before the rule, it was said that there was no jurisdiction to direct a sale out of Court where there were infants interested, and the trustees had no power of sale (*Strugnell v. Strugnell*, 1884, 27 Ch. D. 258).

Account of Rents, etc.—Where one of several tenants in common has been in possession, and has received more than his share of rents and profits, an account may be directed against him (*Lorimer v. Lorimer*, 1820, 5 Madd. 363); and he may be charged with an occupation rent (*Turner v. Morgan*, 1803, 8 Ves. 145); or a receiver may be appointed (*Porter v. Lopes*, 1877, 7 Ch. D. 358).

The amount of the occupation rent may be set off against the share of the co-owner, but not against the mortgagee of a share (*Hill v. Hickin*, [1897] 2 Ch. 579).

Where the owner of one moiety, who was also tenant for life of the entirety, borrowed money, which was spent in permanent improvements to the property, it was held that the present value of the improvements, not exceeding the sum originally borrowed, must be borne rateably by the owners of both moieties (*In re Jones, Farrington v. Forrester*, [1893] 2 Ch. 461; and see *In re Cooke's Mortgage, Lawledge v. Tyndall*, [1896] 1 Ch. 923; *Teasdale v. Sanderson*, 1864, 33 Beav. 534).

Costs.—According to the old rule of the Court of Chancery, no costs were given prior to the commission (*Agar v. Fairfax*, 1810, 17 Ves. 533); the costs of issuing, executing, and confirming the commission being borne by the parties in proportion to the value of their respective interests. After the passing of the Partition Act, 1868, it was held that it had not altered the practice in that respect (*Landell v. Baker*, 1868, L. R. 6 Eq. 268). But by sec. 10 full discretion was given to the Court as to costs up to the hearing, and it is no longer bound by the old rule (*Simpson v. Ritchie*, 1873, L. R. 16 Eq. 103).

In the absence of special circumstances, the full costs of a partition action will now be ordered in the case of a sale to be paid out of the proceeds, and in case of a partition to be borne by the parties in proportion to their respective shares (*Cannon v. Johnson*, 1870, L. R. 11 Eq. 90; *Ball v. Kemp-Welch*, 1880, 14 Ch. D. 512); see also *Wilkinson v. Joberns*, 1873,

L. R. 16 Eq. 14; *Porter v. Lopes*, 1877, 7 Ch. D. 358; *Richardson v. Fea* 1888, 39 Ch. D. 45).

In *Belchier v. Williams*, 1890, 45 Ch. D. 510, North, J., held that a rule which exists in administration actions that, as regards an incumbent share, only one set of costs can be allowed, to be shared between a mortgagor and mortgagee, does not apply to a partition action, and that in such an action both mortgagor and mortgagee will, as a rule, have their costs out of the estate. But in *Catton v. Banks*, [1893] 2 Ch. 2 Kekewich, J., refused to follow that decision, holding that only one set of costs should be allowed out of the proceeds of sale in respect of each share.

Costs can be taxed as between solicitor and client only by consent (*B v. Kemp-Welch*, 1880, 14 Ch. D. 512).

It may be mentioned, before finally parting with the subject of partition by the Court, that the provisions of the Settled Land Acts, which enable the trustees of the settlement for the purposes of the Acts, or persons appointed by the Court, to exercise the power of the Acts on behalf of infants, have done much to diminish the number of actions brought under the Partition Acts.

C. PARTITION UNDER THE INCLOSURE ACTS.

The Inclosure Acts, 1845–1876, contain various provisions with regard to the partition of lands, as well those subject to be inclosed under the Acts, as those not subject to be so inclosed or subject to be inclosed, as to which no application for inclosure is pending.

By the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), the powers and duties of the Land Commissioners for England (the style given to the Inclosure Commissioners for England and Wales by sec. 48 of the Settled Land Act, 1882) were transferred to the Board of Agriculture established by that Act.

The following appear to be the effect of the principal provisions of the Acts on the subject of partition:—

Inclosure Act, 1845.—By the Inclosure Act, 1845 (8 & 9 Vict. c. 11) it is in effect provided that—

partition may be made by the valuer appointed under the Act, upon the request in writing of any persons interested in land to be inclosed in undivided shares, or as joint tenants, co-parceners, or tenants in common of the lands or allotments coming to several persons; and the lands may be allotted to them in severalty, and will thereafter holden and engaged by them in severalty, subject to the same uses as such undivided share would have been subject to in case such partition had not been made (s. 90).

All costs and expenses attending any partition under the Act are to be borne by the persons interested, in such manner and proportion as the valuer shall order (s. 91).

Inclosure Act, 1848.—By the Inclosure Act, 1848 (11 & 12 Vict. c. 9) the provisions of the prior Acts with regard to exchange of lands not subject to be inclosed (8 & 9 Vict. c. 118, ss. 147, 148; 9 & 10 Vict. c. 70, s. 10 & 11 Vict. c. 111, ss. 4, 6) are extended to partition. Accordingly, upon the application in writing of the persons interested who desire a partition, the Board may direct inquiries whether such partition would be beneficial to the owners of the undivided shares; and in case the Board shall be of such opinion, and that the terms of partition are just and reasonable, and no notice of dissent be given, an order of partition may be framed and confirmed. In such order the land allotted in severalty to each person is to be specified, and is to be and enure to the same uses, trusts, intents, a

purposes, and to be subject to the same conditions, charges, and incumbrances as the undivided share in respect of which it is allotted would have been subject to if the order had not been made (s. 13).

The provisions of the earlier Acts as to notice, dissent, confirmation, and expenses, etc., with respect to an exchange, are to extend to a partition (s. 14).

As to the effect of an award of partition under these Acts upon the title of the allottee, see *Jacomb v. Turner*, [1892] 1 Q. B. 47.

Inclosure Act, 1849.—By the Inclosure Act, 1849 (12 & 13 Vict. c. 83), the powers of partition under the Inclosure Acts are to extend and be applicable to all incorporeal rights, easements, and other hereditaments. The application of two-thirds in value of the persons interested jointly, severally, as a class, or in common, is to be deemed to be the application of all persons interested (s. 7).

Inclosure Act, 1852.—By the Inclosure Act, 1852 (15 & 16 Vict. c. 79), land held under separate titles by the same person may be partitioned (s. 31).

Partitions and exchanges may also be effected at one and the same time (s. 32).

Inclosure Act, 1854.—By the Inclosure Act, 1854 (17 & 18 Vict. c. 97), an order of partition may be made upon the application of parties in possession under an agreement for partition (s. 5).

Inclosure Act, 1857.—By the Inclosure Act, 1857 (20 & 21 Vict. c. 31), on a partition, disproportion in value of allotments in severalty may be compensated by a perpetual rent-charge, to be charged on the land for the excess in value of which such rent-charge is an equivalent (s. 7); but the deficiency in value of any land must not exceed one-eighth part of the actual value thereof (s. 8).

Inclosure Act, 1859.—By the Inclosure Act, 1859 (22 & 23 Vict. c. 43), lessees need not join in an application for allotment (s. 10).

The provisions as to notice of dissent are not to apply to partitions in which the application is made by two-thirds in value of the persons interested (s. 11).

The net result of these provisions has been thus summed up by a writer on the subject:—

It will be seen, therefore, that the Board of Agriculture have a compulsory power of partition, against the wish of the majority of the joint-owners, in the case of lands to be inclosed. In these cases they can partition on the request of any person interested. In cases of lands not about to be inclosed, however, their powers extend only to making an inquiry whether the proposed partition would be beneficial to the joint-owners, and on that appearing, to make an order of partition, provided that two-thirds in value of the joint-owners assent (Foster, p. 166).

See JOINT-TENANCY; PARCENERS; TENANCY IN COMMON.

[*Authorities*.—Bacon's *Abridgment of the Law*, 7th ed., 1832, tit. "Co. Parcenus"—Joint-Tenants, and Tenants in Common; Coke upon *Littleton*, 19th ed., 1832; Daniell's *Chancery Practice*, 6th ed., 1884, pp. 1333-1361; Dart on the *Law of Vendors and Purchasers*, 6th ed., 1888, pp. 1298-1312; Elton on *Copyholds*, 2nd ed., 1893, pp. 118-120; Foster on *Joint-Ownership and Partition*, 1808; Lawrence on *Sale under the Partition Act*, 1868; Morgan's *Chancery Acts and Orders*, 6th ed., 1885; Seton's *Judgments and Orders*, 5th ed., 1893, ch. xlvi.; Shelford's *Real Property Statutes*, 9th ed., 1892; Story's *Equity Jurisprudence*, 2nd English ed., 1892, chap. xxiv.; Walker on the *Partition Acts*, 2nd ed., 1882; White and Tudor's *Equity Cases*, 7th ed., 1897, vol. i. pp. 181-222.]

Partnership.

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Until recent years the law of partnership, like many other importa branches of English law, was only to be found in legal decisions a text-books, but in the year 1890 the existing law on this subject was to large extent codified, and to some extent amended, by the Partnership A of that year (53 & 54 Vict. c. 39), which came into operation on t 1st January 1891 (*ibid.*, s. 49). The Act is not a complete code of partn ship law; it contains no provisions regulating the administration partnership assets in the event of death or bankruptcy, and it is sile on the subject of goodwill. The Act itself provides, by sec. 46, that t existing rules of equity and common law shall continue in force, except far as they are inconsistent with the express provisions of the Act. But all points specifically dealt with by the Act, the Act, and not the decisio previous to it, is now the one binding authority (see the remarks of Lc Herschell in *Bank of England v. Vaghiano*, [1891] App. Cas. pp. 144, 14

1. NATURE OF PARTNERSHIP.

(1) *Definition of Partnership.*—By the Partnership Act, 1890 (s. 1 (1 "partnership" has been defined as "the relation which subsists betwe

persons carrying on a business in common with a view of profit." Business includes every trade, occupation, or profession, (see sec. 45).

This definition would include not only partnerships in the ordinary sense of the term, but also many corporations and companies, such as joint stock companies, cost book mining companies, and others, which differ from ordinary partnerships in many important respects. These corporations and companies are, however, excepted from the Partnership Act (s. 1 (2)), and omitted from the present article, which is confined to partnerships within that Act.

The statutory definition taken in connection with the other sections of the Act, especially sec. 2, is now the ultimate test applicable to the determination of the question, whether in any particular case a partnership does or does not exist. It follows from the terms of the definition, that societies which do not carry on business with a view to profit, such as clubs (*Flemyng v. Hector*, 1836, 2 Mee. & W. 173; *Todd v. Emly*, 1841, 8 Mee. & W. 505; *The St. James's Club*, 1852, 2 De G., M. & G. 383) and societies formed for the purpose of purchasing land and reselling it to the members (*In re Siddall*, 1885, 29 Ch. D. 1; *Crowther v. Thorley*, 1884, 32 W. R. 330), or of investing the moneys of the members, and managing, but not trafficking in, the investments so made (*Smith v. Anderson*, 1880, 15 Ch. D. 247), are not partnerships.

Moreover, although such societies as mutual insurance (*Ex parte Hargrove*, 1875, L. R. 10 Ch. 542; *Padstow Total Loss Assoc.*, 1882, 20 Ch. D. 137), mutual loan (*Shaw v. Benson*, 1883, 11 Q. B. D. 563; *Ex parte Poppleton*, 1884, 14 Q. B. D. 379), or mutual benefit (*Jennings v. Hammond*, 1882, 9 Q. B. D. 225) societies have been held to be associations for the acquisition of gain within the meaning of the Companies Act 1862 (s. 4), yet these societies are not partnerships (Lindley on *Partnership*, p. 14; Pollock's *Digest of the Law of Partnership*, p. 9), for the members do not carry on any business in common, nor, it would seem (see 20 Ch. D. pp. 145, 149), is their business, such as it is, carried on with a view to profit in the sense in which that word is used in the above definition.

The test of partnership is the carrying on of a business, and not an agreement to carry it on. Persons who are only contemplating a future partnership, or have only entered into an agreement that they will at some future time, or on the fulfilment of certain conditions, become partners, are not partners until the arrival of that time or the fulfilment or waiver of those conditions (*Dickinson v. Valpy*, 1829, 10 Barn. & Cress. pp. 141, 142; *Fox v. Clifton*, 1830, 6 Bing. 776; *Howell v. Brodie*, 1839, 6 Bing. N. C. 44). It is upon this principle that promoters and others merely associated together to form a company are not partners, even though they intend to become members of the company after its formation (*Reynell v. Lewis*, 1846, 15 Mee. & W. 517; *Capper's case*, 1850, 1 Sim. N. S. 178; *Hutton v. Thompson*, 1851, 3 Cl. H. L. 161; *Bright v. Hutton*, 1852, *ibid.*, 368).

If a person stipulates for an option to become a partner, he will not be a partner until he has exercised that option, even though he may have a considerable control over and interest in the business in the meantime (*Ex parte Jones*, [1896] 2 Q. B. 484; *Ex parte Davis*, 1863, 4 De G., J. & S. 523; *Gabriel v. Evill*, 1842, 9 Mee. & W. 297; *Price v. Groom*, 1848, 2 Ex. Rep. 542). It must not, however, be supposed that a person who enters into an agreement which, in fact, creates a present partnership, will be able to shelter himself from the consequences of that position under cover of such a stipulation as is now under consideration (see *Courtenay v. Wagstaff*, 1864, 16 C. B. N. S. p. 131).

(2) *Rules for Determining the Existence of a Partnership.*—Partnership a relation resulting from a contract, and the fundamental rule to be observed in determining the existence of a partnership, is that regard must be paid to the true contract and intention of the parties as appearing from the whole facts of the case (*Cox v. Hickman*, 1860, 8 Cl. H. L. 268; *Mollwo, Mann & Co. v. Court of Wards*, 1872, L. R. 4 P. C. 419; *Badeley v. Consolidated Bank*, 1888, 38 Ch. D. at p. 258). If a partnership be the legal consequence of the true agreement, the parties thereto will be partners, though they may have intended to avoid this consequence (*Pooley v. Driver*, 1876, 5 Ch. D. 458; *Ex parte Delhasse*, 1878, 7 Ch. D. 511; and *Adam v. Newbiggin*, 1888, L. R. 13 App. Cas. at p. 315). Although this principle is now enunciated in the Partnership Act, 1890, it is still law (*Davis v. Davis*, [1894] 1 Ch. 393, and Part. Act, 1890, s. 46). The Act contains (several important subsidiary rules for determining whether a partnership does or does not exist. These rules merely state the previous law, and the cases which were formerly the authorities for them may still be useful referred to in illustration of their meaning and application.

Co-ownership of property does not of itself create a partnership as to anything so owned, whether the owners do or do not share any profit made by the use thereof (Part. Act, 1890, s. 2 (1)). Thus persons who join in the purchase of goods for the purpose of dividing such goods among themselves are not partners, (*Coope v. Eyre*, 1788, 1 Black. H. 37, and 2 R. 706; *Hoare v. Dawes*, 1780 1 Doug. K. B. 371), though if they purchase goods for resale, with a view to divide the profits arising therefrom, they are partners (*Reid v. Hollinshead*, 1825, 4 Barn. & Cress. 867, and 28 R. 488). So co-owners of a racehorse, who share his winnings and the expenses of his keep, and have agreed that one of them shall have the management of the horse, and in the first instance find the money necessary for his keep may not be partners as to the horse (*French v. Styrring*, 1857, 2 C. B. N. 357). So, too, part owners of a ship are not usually partners (*Helme Smith*, 1831, 7 Bing. 709; *Green v. Briggs*, 1848, 6 Hare, 395), though they may be (*Campbell v. Mullett*, 1818, 2 Swans. 551, and 19 R. R. 127). Co-owners who are not partners as to the property owned in common, may be partners as to the profits derived from its use (see *Davis v. Davis*, [1894] 1 Ch. 393, and cases cited *infra* under the sub-heading "Partnership Property").

The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a common interest in the property from which such returns are derived (s. 2 (2)). Thus where a firm of stockbrokers had entered into an agreement with one G. who was not a stockbroker, that he should introduce clients to them, and they should transact business on the Stock Exchange for such clients, on the terms that G. should receive one-half of the commission earned by the firm in respect of such transactions, and should pay the firm one-half of any loss incurred thereby, the Court of Appeal considered that no partnership existed between the firm and G., for no partnership was intended, and the commissions to be divided were gross returns, not profits (*Sutton & Co. v. Grey*, [1894] 1 Q. B. 285; see also *Lyon v. Knowles*, 1863, 3 B. & S. 556, and agreement between the proprietor and the manager of a theatre).

It was at one time thought that all persons who shared in the profits as distinguished from the gross returns of a business, were so far partners in that business as to incur the liabilities of partners to third parties, even though no partnership was contemplated as between themselves (*Grace Smith*, 1775, 2 Black. W. 998; *Waugh v. Carver*, 1793, 2 Black. H. 22

and 14 R. R. 845). This doctrine was, however, finally overruled by the House of Lords in the celebrated case of *Cox v. Hickman* (1860, 8 Cl. H. L. 268). Since this decision, participation in profits has ceased to be a conclusive test either of partnership or of liability as a partner.

Sharing profits, though not of itself sufficient to constitute partnership, is *prima facie* evidence of it (s. 2 (3)). This means, that if all that is known is that two persons are sharing in the profits of a business, the inference is that such persons are partners; if, however, the participation in profits is only one among other circumstances, all the circumstances must be considered in order to ascertain the real intention of the parties; and in such case the participation in profits must not be treated as raising a presumption of partnership which has to be rebutted by something else (*Davis v. Davis*, [1894] 1 Ch. 396; *Badeley v. Consolidated Bank*, 1888, 38 Ch. D. 238).

The books contain many decisions in which persons entitled to share in the profits of a business have been held not to be partners, e.g. *Hawksley v. Outram*, [1892] 3 Ch. 359 (vendors and purchasers of a business); *Holme v. Hammond*, 1872, L. R. 7 Ex. 218 (executors of deceased partners and surviving partners); *Bullen v. Sharp*, 1865, L. R. 1 C. P. 86, and *Ex parte Tennant*, 1877, 6 Ch. D. 303 (arrangements between father and son). Some of the more common cases were specially provided for by Bovill's Act (28 & 29 Vict. c. 86), which, though repealed, is substantially re-enacted by the Partnership Act, 1890 (s. 2 (3) and s. 3). By the latter Act it is provided that persons sharing the profits of a business under the following circumstances, do not, by reason only of such participation in profits, become partners in the business or liable as such, viz.: a creditor receiving payment of his debt by instalments or otherwise out of the profits of a business (s. 2 (3) (a)); *Cox v. Hickman*, 1860, 8 Cl. H. L. 268; a servant or agent employed in the business, and remunerated by a share of the profits (s. 2 (3) (b)); *Ross v. Parkyns*, 1875, L. R. 20 Eq. 331; a widow or child of a deceased partner, receiving by way of annuity a portion of the profits of the business (s. 2 (3) (c)); a person who has advanced money to another engaged or about to engage in business, on a contract with him, that the lender shall receive a rate of interest varying with the profits, or a share of the profits, arising from carrying on the business (or a sum out of such profits, see *Ex parte Jones*, [1896] 2 Q. B. 484), provided that the contract be in writing, and signed by or on behalf of all the parties thereto (s. 2 (3) (d)); and a person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business (s. 2 (3) (e)).

If, however, the person to whom the money is advanced on such a contract as above mentioned (whether it be in writing or not, *Ex parte Schofield*, [1897] 2 Q. B. 495), or the buyer of the goodwill becomes bankrupt, compounds with his creditors or dies insolvent, the lender is not entitled to recover anything in respect of his loan, nor is the seller of the goodwill entitled to recover anything in respect of his share of profits, until the claims of the other creditors for value are satisfied (s. 3 re-enacting s. 5 of Bovill's Act; and see *Ex parte Taylor*, 1879, 12 Ch. D. 366). A person who has advanced money on the terms of sharing profits cannot escape from the operation of sec. 3 by subsequently agreeing to take a fixed rate of interest, unless the first advance has been re-paid, without any agreement or understanding to re-lend the money, and a new loan has been created (*In re Stone*, 1886, 33 Ch. D. 541; *In re Hildesheim*, [1893] 2 Q. B. 357). This section does not, however, deprive the lender of any security he may have taken for his money (*Ex parte Sheil*, 1877, 4 Ch. D. 789), nor of his right to enforce such security (*Badeley v. Consolidated Bank*, 1888, 38 Ch.

D. 238), nor does it affect his rights in respect of other *bond fide* advances made by him (*Ex parte Mills*, 1873, L. R. 8 Ch. 569).

The provisions of the Partnership Act now under consideration do not enable persons who are really partners to escape from the liabilities of that position. Persons who have advanced money to others engaged in business have in many cases been held to be partners, in spite of elaborate precautions to avoid this risk (compare *Syers v. Syers*, 1876, 1 App. Cas. 174; *Pool v. Driver*, 1876, 5 Ch. D. 458; and *Ex parte Delhasse*, 1878, 7 Ch. D. 51 where the so-called lender was held to be a partner; with *Mollwo, March, Co. v. Court of Wards*, 1872, L. R. 4 P. C. 419; *Badeley v. Consolidated Bank*, 1888, 38 Ch. D. 238; *Ex parte Jones*, [1896] 2 Q. B. 484, where it was held to be a creditor, and not a partner).

Persons who agree to share the profits of a business and to share the losses in the sense of making good the losses, if any are sustained, will be partners in the business, though as between themselves and the other persons interested they may not have all the rights of a partner (*Walker v. Hirsch*, 1884, 27 Ch. D. 460). Persons may, however, be liable to make good such losses without thereby becoming partners (*Sutton & Co. v. Grey*, [1894] Q. B. 285; *Ross v. Parkyns*, 1875, L. R. 20 Eq. 331).

Persons who agree to share the profits of a business are *prima facie* partners, although they stipulate between themselves that they shall not be liable for losses beyond the sums they agree to advance (*Brown v. Tapscott*, 1840, 6 Mee. & W. 119), or that some of them shall be indemnified by the others against loss (*Bond v. Pittard*, 1838, 3 Mee. & W. 357, and *Geddes v. Wallace*, 1820, 2 Bli. 270, and 21 R. R. 66).

A common stock is not essential to a partnership; persons who share profits may be partners, though each uses his own property for earning the profits to be divided (*Fromont v. Coupland*, 1824, 2 Bing. 170, & 27 R. 1575).

Persons may be partners in one particular transaction or series of transactions without being partners in their business generally (*Robinson v. Anderson*, 1855, 20 Beav. 98, and 7 De G., M. & G. 239; *Lovell v. Hick*, 1837, 2 Y. & C. Ex. 481). Such partnerships are sometimes called "particular" as distinguished from "general" partnerships.

When several persons, A, B, and C, are in partnership together, and one of them, A, agrees to share his portion of the profits with a stranger D, the agreement will not make D a partner with B and C, who are no parties to the agreement (see per Lord Eldon in *Ex parte Barrow*, 1815, 2 Rose, 252 though it may make him a partner with A. and so constitute what is called a "subpartnership." This is in accordance with the maxim of the civil law "*Socius mei socii, socius meus non est.*"

(3) *Partnership by Estoppel*—"Holding Out"—*Ostensible Partnership*.—It has long been established (*Waugh v. Carver*, 1793, 2 Black. H. 235, and 14 R. R. 845) that a person who represents himself to be, or (as the phrase is) "holds himself out" as a partner in a firm, will be liable as a partner to anyone who has given credit to that firm on the faith of such representation (Part. Act, 1890, s. 14 (1)). This doctrine is nothing more than a particular instance of the general principle of estoppel by conduct. In order to fix a person with liability on this ground, two things must concur: first, the alleged representation must have been made by him, or he must have knowingly suffered it to be made; secondly, it must have been known to and relied on (see *Smith v. Bailey*, [1891] 2 Q. B. 403 disapproving *Stables v. Eley*, 1825, 1 Car. & P. 614) by the person seeking to avail himself of it (s. 14). These are questions of fact, not of law (*Wood*

Duke of Argyll, 1844, 6 Man. & G. 928; *Lake v. Duke of Argyll*, 1844, 6 Ad. & E. N. S. 477). Provided the above conditions are fulfilled, it is immaterial whether the representation was or was not made or communicated to the person relying on it by or with the knowledge of the person making the representation or suffering it to be made (s. 14; *Martyn v. Gray*, 1863, 14 C. B. N. S. 824).

The manner in which the representation is made is immaterial; it may be by words spoken or written, or by conduct (s. 14), as, for instance, by signing prospectuses (*Collingwood v. Berkeley*, 1863, 15 C. B. N. S. 145), by being party to resolutions (*Maddick v. Marshall*, 1864, 16 C. B. N. S. 387, and 17 *ibid.*, 829), or by retiring from a firm and failing to give due notice of such retirement (Part. Act, 1890, s. 36 and *inf.*, p. 467). Probably—though there has been no decision on the combined effect of secs. 14 and 36 of the Act of 1890—a person who retires from a firm and duly notifies his retirement, will not be liable to future creditors of the firm, by reason only of his former partners with his knowledge continuing to use the old firm name, even if his own name appears as part of it (*Newsome v. Coles*, 1811, 2 Camp. N. P. 617, and 12 R. R. 756; *Brown v. Leonard*, 1820, 2 Chit. Rep. 120, and 23 R. R. 744; *Ex parte Central Bank of London*, [1892] 2 Q. B. 633; cp. *Williams v. Keats*, 1817, 2 Stark. N. P. 290); but if his name does so appear, it seems that his former partners may be restrained from using the old name without his permission in such a manner as to expose him to the risk of having actions brought against him, even though they be entitled to the goodwill of the business (*Gray v. Smith*, 1889, 43 Ch. D. 208; *Thynne v. Shove*, 1890, 45 Ch. D. 577, where, however, the Partnership Act did not apply).

A person who holds himself out or knowingly suffers himself to be held out as a partner, may be liable to others, although they may know that as between himself and his quasi-partners he does not share either profits or losses, for the lending of his name may justify the belief that he is willing to be responsible to those who may be induced to trust to him for payment (*Brown v. Leonard*, 1820, 2 Chit. Rep. 120, and 23 R. R. 744). Moreover, such a person may be liable, though his name be concealed, if the refusal to name him be accompanied by such a description as clearly points him out (*Martyn v. Gray*, 1863, 14 C. B. N. S. 824). Nor will he be the less liable to third parties because he was induced to hold himself out as a partner by promises of irresponsibility or by fraud (see *Collingwood v. Berkeley*, 1863, 15 C. B. N. S. 145; *Maddick v. Marshall*, 1864, 16 C. B. N. S. 387, and 17 *ibid.*, 829; *Ellis v. Schmæck*, 1829, 5 Bing. 521, and 30 R. R. 725).

The continued use of the old firm name, or of a deceased partner's name as part of it, by the surviving partners, does not expose the estate of the deceased partner to liability for debts contracted after his death (Part. Act, 1890, s. 14 (2)), even though the surviving partner who uses the old name is his executor (*Farhall v. Farhall*, 1871, L. R. 7 Ch. 123; *Owen v. Delamere*, 1872, L. R. 15 Eq. 134).

Though a bankrupt partner cannot by his acts bind his partners, a person may be liable for such acts if after the bankruptcy he holds himself out as a partner of the bankrupt (Part. Act, 1890, s. 38).

A person does not incur liability by holding himself out as willing to become a partner; to incur liability he must hold himself out as a partner (*Bourne v. Freeth*, 1829, 9 Barn. & Cress. 632, and 33 R. R. 275).

It would appear that an infant who holds himself out as a partner incurs no liability by so doing (*Price v. Hewitt*, 1852, 8 Ex. Rep. 146; *Glossop v. Colman*, 1815, 1 Stark. N. P. 25, and 18 R. R. 741; *Green v. Greenbank*, 1816,

2 Marsh. 485, and 17 R. R. 529), though he will incur liability if he continues to do so after he has come of age (*Goode v. Harrison*, 1821, 5 Barn. & Ald. 147, and 22 R. R. 307).

(4) *Who may be Partners.*—The common law of England imposes no limit on the number of persons who may be associated together in partnership, but since the Companies Act, 1862 (s. 4), no partnership may be formed between more than ten persons if the partnership business be that of bankers, or more than twenty persons in other cases.

In general, all persons are capable of entering into partnership.

Enemy.—A person, of whatever nationality, residing and carrying on trade in a country at war with this country cannot, during the continuance of the war, become a partner with a person resident in this country; and if two partners are resident in different countries, their partnership is determined by war between those countries (Part. Act, 1890, s. 34; *Evans v. Richardson*, 1817, 3 Mer. 469; *Griswold v. Waddington*, 1818, 15 John. 57, and 16 *ibid.*, 438 (Amer.); *Albrect v. Sussmann*, 1813, 2 Ves. & Bea. 323, and 13 R. R. 110; *McConnell v. Hector*, 1802, 3 Bos. & Pul. 113, and 6 R. R. 724; *Brandon v. Nesbitt*, 1794, 6 T. R. 23 and 3 R. R. 109; and compare *Wells v. Williams*, 1697, 1 Raym. (Ld.) 282). This rule is only recognised and enforced by the belligerent powers.

Infants.—An infant may be a partner, but whilst an infant he incurs no liability and is not responsible for the debts of the firm (*Lovell v. Beauchamp*, [1894] App. Cas. 607). His partners, however, have the right to apply the whole of the partnership assets, including his share, in payment of the partnership debts (*ibid.*), and the infant cannot insist that on taking the partnership accounts he shall be credited with profits and not be debited with losses (*London & North-Western Railway Co. v. M'Michael*, 1850, 5 Ex. Rep. 114). If judgment is obtained against a firm of which an infant is a member, execution may issue against the property of the firm, but not, it seems, against the infant's share in the profits (*Harris v. Beauchamp Bros.*, [1893] 2 Q. B. 534).

An infant may determine the partnership either before or within a reasonable time after attaining his majority, and if he has derived no benefit from the partnership (but not otherwise, see *Holmes v. Blogg*, 1817, 8 Taun. 508, and 19 R. R. 445; *Ex parte Taylor*, 1856, 8 De G., M. & G. 254), he may recover any premium he has paid (*Corpe v. Overton*, 1833, 10 Bing. 253; *Hamilton v. Vaughan-Sherrin Electric Engineering Co.*, [1894] 3 Ch. 589).

An infant on attaining his majority should determine the partnership at once if he intends to do so, and give notice of such determination, otherwise he may be liable under the doctrine of holding out for debts of the firm incurred after he attained twenty-one (*Goode v. Harrison*, 1821, 5 Barn. & Ald. 147, and 24 R. R. 307).

Lunatics.—A lunatic is bound by a contract (see LUNACY) entered into by him with a person who acts *bonâ fide* and does not know of his lunacy (*Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599; *Drew v. Nunn*, 1879 4 Q. B. D. 661; *Molton v. Camroux*, 1848, 2 Ex. Rep. 478, and 4 *ibid.*, 17). Lunatics, therefore, are capable of being partners. Moreover, an existing partnership is not dissolved by one member of it becoming lunatic (*Jones v. Noy*, 1833, 2 Myl. & K. 125; *Sadler v. Lee*, 1843, 6 Beav. 324; Part. Act 1890, s. 35 (1)).

Married Women.—Apart from the Married Women's Property Acts and the doctrine of separate estate, a married woman is incapable of entering into a contract (*Marshall v. Rutton*, 1800, 8 T. R. 545, and 5 R. R. 448).

and therefore of becoming a partner, except—(1) when her husband is a convicted felon (*Ex parte Franks*, 1831, 7 Bing. 762); (2) when the husband and wife are judicially separated (20 & 21 Vict. c. 85, ss. 25, 26); (3) when the wife is deserted by her husband, and has obtained a protection order against him (20 & 21 Vict. c. 85, s. 21, and 21 & 22 Vict. c. 108, ss. 6–10); (4) when the husband is an alien enemy and abroad (*Derry v. Mazarine*, 1697, 1 Raym. (Ld.) 147; *Barden v. Keverberg*, 1836, 2 Mee. & W. 61); and (5) by the custom of London, the wife of a freeman may trade as a *feme sole* (see *Beard v. Webb*, 1800, 2 Bos. & Pul. 93). In equity a married woman has power to contract so as to bind her separate property, which is not subject to a restraint on anticipation. The Married Women's Property Acts, 1882 to 1893, also enable married women to contract so as to bind their existing and (since the Act of 1893) their future separate property, which is not subject to such restraint. To this extent, therefore, a married woman may be a partner even with her husband (see *Butler v. Butler*, 1885, 16 Q. B. D. 374), and though she will incur no personal liability, her separate property will be liable for the debts of the firm (*Scott v. Morley*, 1887, 20 Q. B. D. 170). If she carries on a trade separately from her husband, she is liable to the Bankruptcy Law (45 & 46 Vict. c. 75, s. 1 (5); *In re Hannah Lynes*, [1893] 2 Q. B. 113).

As to *Felons*, see 33 & 34 Vict. c. 23.

(5) *Form of Partnership Contract*.—A contract of partnership does not require to be entered into with any particular formalities, and may be proved by parol evidence or inferred from the conduct of the parties. It would appear, however, that an agreement for a partnership to commence more than a year from the date of the agreement, or for a present partnership to last for more than a year from its commencement, is within the 4th section of the Statute of Frauds (*Williams v. Jones*, 1826, 5 Barn. & Cress. 108, and 29 R. R. 181); but if the parties have acted on the agreement, and become partners, the statute is inapplicable (*Essex v. Essex*, 1855, 20 Beav. p. 449; *Baxter v. West*, 1860, 1 Drew. & Sm. 173; *Burdon v. Barkus*, 1862, 4 De G. & J. 47). Moreover, the fact that the partnership property consists of land (*Forster v. Hale*, 1798, 5 Ves. Jun. 308, and 4 R. R. 128), or that the business of the partnership is the buying and selling of land (*Dale v. Hamilton*, 1846, 5 Hare, 369, on appeal, 2 Ph. Ch. 266; cp. *Caddick v. Skidmore*, 2 De G. & J. 52), does not bring the partnership agreement within that part of the 4th section which relates to land. As to agreements for dissolution, see *Gray v. Smith*, 1889, 43 Ch. D. 208.

(6) *Illegal Partnerships*.—A partnership for a purpose forbidden by positive law, morality, or public policy (*e.g.* for deriving profit from robbery, *Everet v. Williams*, Lindley on *Partnership*, 6th ed., p. 101; the slave trade, *Stewart v. Gibson*, 1838, 7 Cl. & Fin. 707; trading with an enemy, *Evans v. Richardson*, 1817, 3 Mer. 469), is illegal. So also is a partnership formed to attain a legal object in an illegal manner. Thus a partnership which ought to be registered under the Companies Act, 1862 (see s. 4), by reason of the number of partners, is illegal if it be not so registered (*Padstow v. Total Loss Association*, 1882, 20 Ch. D. 137; *Shaw v. Benson*, 1882, 11 Q. B. D. 563).

Where unqualified persons are forbidden by statute, as, for instance, by the Solicitors Acts, to carry on a particular business, a partnership, in the ordinary sense of the term, between a qualified person and one who is not qualified is illegal (*Williams v. Jones*, 1826, 5 Barn. & Cress. 108, and 29 R. R. 181); but if the qualified person is to take no part in the conduct of the business, an agreement entitling him to a share in the profits is not illegal (*Scott v. Miller*, 1859, John. 220; *Candler v. Candler*, 1821, Madd. & G. 141).

If a partnership be illegal, the partners have no remedy against each other for contribution towards payment of the losses of the firm (*Mitchell v. Cockburn*, 1794, 2 Black. H. 380); nor can one partner maintain an action of account against another (*Armstrong v. Armstrong*, 1834, 3 Myl. & K. 45; cp. *Thwaites v. Coulthwaite*, [1896] 1 Ch. 496). If any such action be brought, the defendant may resist the proceedings on the ground of illegality, or the Court will of its own accord decline to interfere if the illegality be brought to its notice (*Scott v. Brown, Doering, M'Nab, & Co.*, [1892] 2 Q. B. 724).

Moreover, the members of an illegal partnership cannot maintain any action in respect of a transaction tainted with the illegality (*Briggs v. Lawrence*, 1789, 3 T. R. 454, and 1 R. R. 740; *Jennings v. Hammond*, 1882, 9 Q. B. D. 225). But the illegality of the partnership affords no defence to an action brought against it by a person who is no party to the illegality, in respect of a transaction which is legal in itself.

(7) *Duration of Partnership*.—A partnership is a partnership at will, unless some agreement to the contrary can be proved (Part. Act, 1890, s. 26 (1)). Such an agreement may be express or implied. The fact that partners have taken land for partnership purposes on lease for a term of years, is not of itself a sufficient ground for implying an agreement that the partnership is to last for the same term (*Crawshay v. Maule*, 1818, 1 Swans. 495, and 18 R. R. 126). Again, when one partner agrees with a stranger for a subpartnership (see p. 456), it is not to be implied therefrom that the duration of the subpartnership is to be coextensive with the original partnership (*Frost v. Moulton*, 1856, 21 Beav. 596). Where a partnership entered into for a fixed term is continued after the term has expired, and there is no agreement as to the additional time it is to last, it is treated as having become a partnership at will (Part. Act, 1890, s. 27 (1); *Neilson v. Mossend Iron Co.*, 1886, 11 App. Cas. 298 and *infra*, p. 479).

If a partnership be entered into for a single adventure or undertaking, an agreement that the partnership shall last until the termination of the adventure or undertaking will be inferred (Part. Act, 1890, s. 32 (b); *Reade v. Bentley*, 1858, 4 Kay, & J. 656; and see *M'Clean v. Kennard*, 1874, L. R. 9 Ch. 336).

(8) *Nature of Firm and Firm Name*.—Partners are called collectively a firm, and the name under which they carry on business is called the firm name (Part. Act, 1890, s. 4).

Although partners may now in most cases sue and be sued in the firm name (R. S. C. Order 48 A.), speaking generally, the law of England does not recognise a firm as distinct from the members composing it (*Ex parte Corbett*, 1880, 14 Ch. D. p. 126), and any change amongst them destroys the identity of the firm. Thus if a person be appointed the agent of a firm, the death or retirement of one of the partners determines the agency (*Tasker v. Shepherd*, 1861, 6 H. & N. 575), and the retirement may even operate as a wrongful dismissal of the agent (*Bruce v. Calder*, [1895] 2 Q. B. 253). An authority to trustees to lend money to a firm does not, as a general rule, authorise a loan to the continuing partners after the death or retirement of one of them (*In re Tucker*, [1894] 1 Ch. 724; *Fowler v. Raynal*, 1848, 2 De G. & Sm. 749, 3 Mac. & G. 500). So, too, a continuing guaranty given either to a firm, or to a third person in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm (Part. Act, 1890, s. 18).

Generally speaking (pawnbrokers are an exception; see 35 & 36 Vict.

c. 93, s. 13), partners may carry on business under any name they choose to adopt (*Merchant Banking Co. of London v. Merchants' Joint Stock Bank*, 1878, 9 Ch. D. p. 563), provided they do not mislead the public by using a name similar to that of another firm, so as to pass off themselves or their goods for that other, or the goods of that other (*Burgess v. Burgess*, 1853, 5 De G., M. & G. 896; *Levy v. Walker*, 1879, 10 Ch. D. 436; *Hendriks v. Montague*, 1881, 17 Ch. D. 638; and see, when their own name is likely to mislead, *Saunders v. Sun Life Assurance Co. of Canada*, [1894] 1 Ch. 537; *Turton v. Turton*, 1889, 42 Ch. D. 128; *Tussaud v. Tussaud*, 1890, 44 Ch. D. 678; and cp. *F. Pinet & Cie. v. Maison Louis Pinet*, [1898] 1 Ch. 179; *Lewis's v. Lewis*, 1890, 45 Ch. D. p. 284; *Croft v. Day*, 1843. 7 Beav. 84).

The firm name, moreover, may be registered as a TRADE MARK for particular classes of goods (46 & 47 Vict. c. 57, ss. 64, 65).

2. RELATIONS OF PARTNERS TO PERSONS DEALING WITH THEM.

(1) *Authority of Partner to bind the Firm*—(a) *General*.—Every partner is an agent of the firm, and his other partners for the purpose of the business of the partnership; and *prima facie* the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member, bind the firm and his partners (Part. Act, 1890, s. 5).

It is competent for the partners, by agreement between themselves, to restrict the power of any one or more of them to bind the firm, and if such an agreement has been entered into, no act done in contravention of it is binding on the firm with respect to persons having notice of the agreement (Part. Act, 1890, s. 8). But such an agreement does not affect persons who deal with a partner whose authority is thus restricted, without notice of the agreement (*Cox v. Hickman*, 1860, 8 Cl. H. L. p. 304), unless, indeed, they do not know or believe him to be a partner; for in that case he has neither real nor, so far as they are concerned, apparent authority to bind the firm (Part. Act, 1890, s. 5; *Nicholson v. Ricketts*, 1860, 2 El. & El. 524; *Holme v. Hammond*, 1872, L. R. 7 Ex. 233).

A partner's implied or apparent authority to bind his firm is limited to acts which are necessary for carrying on the partnership business in the way in which such businesses are usually carried on, and does not extend to acts which, however urgent, are in this sense unusual (*Hawtayne v. Bourne*, 1841, 7 Mee. & W. 595; *Simpson's Claim*, 1887, 36 Ch. D. 532).

If a partner does an act for a purpose apparently not connected with the firm's ordinary course of business, he is not acting in pursuance of any apparent authority, and the firm will not be bound unless the partner in fact had authority. If, for instance, a partner pledges the credit of the firm for a purpose apparently not connected with its ordinary course of business, *e.g.* for the purpose, to the knowledge of the creditor, of paying his private debts (*Leverson v. Lane*, 1862, 13 C. B. N. S. 278; *In re Riches*, 1864, 4 De G., J. & S. 581; *Snaithe v. Burridge*, 1812, 4 Taun. 684), the firm is not bound unless he is in fact specially authorised by the other partners (Part. Act, 1890, s. 7). The onus of proving such authority is on the creditor, and it is not sufficient for him to prove that he honestly believed there was such authority (*ibid.*, and *Kendal v. Wood*, 1871, L. R. 6 Ex. 243), unless the other partners are by their conduct estopped from denying the authority (*ibid.*).

An admission or representation made by one partner concerning the partnership affairs and in the ordinary course of its business is evidence

against the firm (Part. Act, 1890, s. 15; as to accounts rendered, see *Fergusson v. Fyffe*, 1840, 8 Cl. & Fin. 121), and may be conclusive by way of estoppel. This, however, does not apply to a representation by one partner as to his authority to bind the firm (*Ex parte Agace*, 1792, 2 Coz 312, and 2 R. R. 49), nor probably as to the extent and nature of the business of the firm, for the extent of his authority depends upon the nature of that business.

Notice to an acting partner of any matter relating to the partnership affairs, operates as notice to the firm, except in the case of a fraud upon the firm committed by him or with his consent (Part. Act, 1890, s. 16 *Williamson v. Barbour*, 1877, 9 Ch. D. 535; *Lacey v. Hill*, 1876, 4 Ch. D. 549).

(b) *Implied authority in Matters of Contract*.—Inasmuch as an act which is common in carrying on one kind of business in the usual way may not be required for carrying on business of another kind, any general statement as to what acts are and what acts are not within the implied authority of a partner, must be applied with caution; but in the absence of evidence of usage in the kind of business in question to the contrary, it appears—

(A) That a partner has implied authority to do the following acts or behalf of his firm:—

(i) Receive and give receipts for debts due to his firm (*Stead v. Salt* 1825, 3 Bing. p. 103, and 28 R. R. p. 603; *Porter v. Taylor*, 1817, 6 M. & S. 156, and 18 R. R. 338), and (probably) retain a solicitor to conduct an action to recover such debts (*Court v. Berlin*, [1897] 2 Q. B. 396).

(ii) Draw cheques, not post dated (*Foster v. Mackreth*, 1867, L. R. 2 Ex. 163), on the bankers of the firm in the firm name (*Laws v. Rand*, 1857, 3 C. B. N. S. 442).

(iii) Purchase on the credit of the firm goods required for carrying on its business in the usual way (*Bond v. Gibson*, 1808, 1 Camp. N. P. 185, and 10 R. R. 665; *Gardiner v. Childs*, 1837, 8 Car. & P. 345).

(iv) Sell any of the partnership goods (*Lambert's case*, 1613, Godb. 244; *Dore v. Wilkinson*, 1817, 2 Stark. N. P. 287).

(v) Engage servants for the partnership business (*Beckham v. Drake*, 1841, 9 Mee. & W. 79; *Donaldson v. Williams*, 1883, 1 Car. & M. 345).

And if the partnership is an ordinary trading partnership—

(vi) Draw, accept, make, and endorse bills of exchange and promissory notes in the name of the firm (*In re Riches*, 1864, De G., J. & S. 581; *Stephens v. Reynolds*, 1860, 5 H. & N. 513). But a member of a firm of mining adventurers (*Dickinson v. Valpy*, 1829, 10 Barn. & Cress. 128); quarry workers (*Thicknesse v. Bromilow*, 1832, 2 Crompt. & J. 425); farmers (*Greenslade v. Dower*, 1828, 7 Barn. & Cress. 635, and 31 R. R. 272); or solicitors (*Hedley v. Bainbridge*, 1842, 3 Ad. & E. N. S. 316; *Levy v. Pyne*, 1842, Car. & M. 453), has no such implied authority.

(vii) Borrow money on the credit of the firm (*Lane v. Williams*, 1692, 2 Vern. 277; *Bank of Australasia v. Breillat*, 1847, 6 Moo. P. C. 152), and for that purpose pledge the personal property of the firm (*Ex parte Bonbonus*, 1803, 8 Ves. Jun. 540; *Butchart v. Dresser*, 1853, 10 Hare, 453, and 4 De G., M. & G. 542); and (probably) make an equitable mortgage by deposit of deeds or otherwise of its real or leasehold property (Lindley on *Partnership*, 152; and see *In re Clough*, 1885, 31 Ch. D. 324).

(B) But that a partner has no implied authority—

(i) To bind his firm by a submission to arbitration (*Stead v. Salt*, 1825, 3 Bing. 101, and 28 R. R. 602; *Adams v. Bankhart*, 1835, 1 C. M. & R. 681).

(ii) To bind his firm by deed, even though the partnership be constituted by deed (*Harrison v. Jackson*, 1797, T. R. 207, and 4 R. R. 422; *Steiglitz v. Eggington*, 1815, Holt N. P. 141).

(iii) To give a guaranty on behalf of the firm (*Brettel v. Williams*, 1849, 4 Ex. Rep. 623).

(iv) To make his partners partners with other persons in another business (*Singleton v. Knight*, 1888, 13 App. Cas. 788).

(v) To accept shares, though fully paid up, in a company in satisfaction of a partnership debt (*Niemann v. Niemann*, 1889, 43 Ch. D. 198; cp. *Weikersheim's case*, 1873, L. R. 8 Ch. 831).

(2) *Firm when bound by Acts of its Agent*.—In order that a firm may be bound by the acts of a partner or other agent acting within his authority, the agent whose acts are sought to be imputed to his firm must have acted in his character of agent and not as a principal; if he acted as principal and not as agent, he alone is liable for such acts.

Whether a contract is entered into by an agent as such or by him as a principal, is often, but not always, apparent from the form of the contract (see generally PRINCIPAL AND AGENT; Evans on the *Law of Principal and Agent*; Storey on *Agency*; Lindley on *Partnership*, p. 149 and pp. 186 *et seq.*).

Apart from any general rule of law relating to the execution of deeds or negotiable instruments, an act or instrument relating to the business of the firm, and done or executed in the firm name, or in any other manner showing an intention to bind the firm by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners (*Part. Act*, 1820, s. 6).

The signature of the firm name to a bill of exchange or promissory note is equivalent to the signature, by the person so signing, of the names of all the persons liable as partners in that firm, but subject to that qualification, no person whose name is not on a bill or note is liable to be sued upon it (*Bills of Exchange Act*, 1882, ss. 23, 89).

If two persons, A. and another, partners in trade, carry on business in the name of A., and a bill is accepted for partnership purposes by one of them in A.'s name, both partners will be liable thereon (*Stephens v. Reynolds*, 1860, 5 H. & N. 513). And unless A. also carries on a separate business in his own name, the onus of proving that a bill in A.'s name is in fact the bill of A. and not of the firm, appears to be on the other partner (see *Yorkshire Banking Co. v. Beatson*, 1880, 5 C. P. D. 115, etc.).

If there are two firms with one name, a member of both firms is liable on all bills in the firm name, but a member of only one of such firms will not be liable unless the person giving the bill had authority to use, and did in fact use, the name of that firm of which he is a member (*Swan v. Steele*, 1806, 7 East, 210, and 8 R. R. 618).

No person can sue or be sued upon an indenture unless he be named as a party thereto (*Lord Southampton v. Brown*, 1827, 6 Barn. & Cress. 718, and 30 R. R. 511). If an agent executes a deed in his own name, he and he only can sue or be sued upon it (*Appleton v. Binks*, 1804, 5 East, 148, and 7 R. R. 672). An agent cannot bind his principal by deed unless his authority to do so is conferred by deed (*Berkeley v. Hardy*, 1826, 5 Barn. & Cress. 355, and 29 R. R. 261; *White v. Cuyler*, 1795, 6 T. R. 176, and 3 R. R. 147). And even if the partnership be constituted by deed, an express authority under seal is necessary to enable a partner to bind his firm by deed (*Harrison v. Jackson*, 1797, 7 T. R. 207, and 4 R. R. 422; *Steiglitz v. Eggington*, 1815, Holt N. P. 141).

If a partner does an act on his own behalf or otherwise, so as to bind the firm, the firm will not be bound merely by reason of having obtained the benefit of that act (*Emly v. Lye*, 1812, 15 East, 7, and 13 R. 347; *Bevan v. Lewis*, 1827, 1 Sim. 376 and 27 R. R. 205). Thus, if a partner without real or apparent authority borrows money, the lender cannot recover this money from the firm, although the money may have been applied for its benefit (*Smith v. Craven*, 1831, 1 Crompt. & J. 500; *Hawtrey v. Bourne*, 1841, 7 Mee. & W. 695; *sed vide Reid v. Rigby & Co.*, [1892] 2 Q. B. 40). If, however, the money so borrowed has been expended in paying the legitimate debts of the firm, or for any other legitimate purpose of the firm, the lender is entitled in equity to the repayment of so much of the money as he can show to have been so applied (*Reid v. Rigby & Co. supra*; *Blackburn Building Society v. Cunliffe, Brooks, & Co.*, 1882, 22 Ch. 61; and L. R. 9 App. Cas. 857; *Baroness Wenlock v. River Dee Co.*, 1885, 19 Q. B. D. 155, and 36 Ch. D. 675 n.).

(3) *Liability of Firm for Torts, Frauds, and Breaches of Trust.*—A principal is civilly liable for the tortious or fraudulent act, whether criminal or not (*Dyer v. Munday*, [1895] 1 Q. B. 742), of his agent, not only when he has previously authorised or subsequently ratified the act (as to the requisites of ratification, see *Marsh v. Joseph*, [1897] 1 Ch. 214; *Wilson v. Tummam*, 1843, 6 Man. & G. 236), but even though he has expressly forbidden it (*Collmann v. Mills*, [1897] 1 Q. B. 396), if it has been committed by the agent in the course and as part of his employment.

Upon this principle a firm is liable for any loss or injury caused to any person not a member of the firm, or for any penalty incurred by any wrongful act or omission of a partner, acting in the ordinary course of the business of the firm, or with the authority of his co-partners; the extent of the firm's liability is the same as that of the partner so acting or omitting to act (Part. Act, 1890, s. 10). It is to be observed that this section draws a distinction between fraud and other wrongs. Thus all the members of a firm of solicitors are liable for the negligent advice given by one of them to a client of the firm (*Blyth v. Fladgate*, [1891] 1 Ch. 337), or for a fraud committed by one of them in the ordinary conduct of their business (*Brydges v. Bromfield*, 1841, 12 Sim. 369; and compare *Marsh v. Joseph*, [1897] 1 Ch. 213); and, speaking generally, all the partners are answerable for the penalties incurred by any breach of a statute (*e.g.* of the revenue law *A.-G. v. Stranyforth*, 1721, Bunb. 97; of the poor law (4 & 5 Wm. 1 c. 76, s. 77); *Davies v. Harvey*, 1874, L. R. 9 Q. B. 433; as to the Trade Marks Acts, see 1 & 2 Will. 4 c. 37, s. 13) committed by one partner in conducting the partnership business. On the other hand, the firm will not be liable for the wilful tort of a partner outside the scope of his authority, though to some extent connected with the business of the firm, *e.g.* for the malicious prosecution of a person for stealing the partnership property (*Arbuckle v. Taylor*, 1815, 3 Dowl. P. C. 160).

By 9 Geo. IV. c. 14, s. 6, a firm is not liable for the false and fraudulent representation as to the character or solvency of any person, unless the representation is in writing, signed by all the partners; signature by one partner in the name of the firm is not sufficient (*Swift v. Jewsbury*, 1877, L. R. 9 Q. B. 301).

With regard to the liability of a firm for the misapplication of money or property by one of its members, the Partnership Act, 1890, provides (b s. 11) that—(a) where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and (b) when a firm in the course of its business receives money or

property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm, the firm is liable to make good the loss. In the cases falling under clause (a), the money is received by the partner as the real or ostensible agent of the firm, and the firm is therefore, in accordance with the principles above explained, treated as having received it, and is responsible for its proper application. If, however, money has been received by a partner acting outside the scope of his real and apparent authority, the receipt thereof by the partner is not a receipt by the firm, and the firm will not, without more, be liable for the misapplication of the money by the partner who did receive it. Thus it is within the ordinary course of the business of solicitors to receive money from clients for investment on a specific security, but it is not within the ordinary course of such business to receive money for investment generally; if, therefore, a member of a firm of solicitors misapplies money intrusted to him by a client for investment in a particular mortgage, his partners, however innocent, are liable for such misapplication (*Willett v. Chambers*, 1778, Cowp. 814); but, in the absence of special circumstances, they are not liable if the money was received by him for investment generally (*Harman v. Johnson*, 1853, 2 El. & Bl. 61; see, too, *Plumer v. Gregory*, 1874, L. R. 18 Eq. 621). The distinction in question is also illustrated by the two cases of *Cleather v. Twisden*, 1883, 28 Ch. D. 340; and *Rhodes v. Moules*, [1895] 1 Ch. 236.

In order to bring a case within clause (b) of sec. 11, the money must have been received by the firm in the course of its business, and have been misapplied while still in the custody of the firm. Thus in *Moore v. Knight*, [1891] 1 Ch. 547, a firm of solicitors received from a client certain moneys for investment; the money was not invested, but was embezzled. The firm for many years rendered accounts to their client of the interest due to her in such form as to represent that the money had been invested, and paid her the interest. Under these circumstances, the estate of a deceased partner, who was not party or privy to the fraud, was held liable to repay the moneys with interest (see also *Blair v. Bromley*, 1847, 2 Ph. Ch. 354; and as to the application of the Statutes of Limitations to such cases, see [1891] 1 Ch. 547). Again, in *Devaynes v. Noble*, *Baring's case* (1816, 1 Mer. 611, and 15 R. R. 169), the firm was held liable for stock of one of its customers wrongfully sold out by the partner in whose name such stock was standing. The stock had been bought by the customer through the firm, and had been transferred with his assent, and in accordance with the custom of the firm, into the name of one partner, and the produce of the sale of the stock had been received by the firm (see too *Clayton's case*, 1 Mer. 572, and 15 R. R. 161). This case should be compared with that of *Bishop v. The Countess of Jersey* (1854, 2 Drew. 143), in which case the innocent partners escaped liability on the ground that the transaction in the course of which the client's money was misappropriated by one the partners, was not a partnership transaction, and that the money, when it was misappropriated, had ceased to be in the custody of the firm (see also cases collected, Lindley on *Partnership*, p. 166).

It is not sufficient, in order to fix innocent partners with liability for the misapplication of money belonging to a third party, merely to show that such moneys came into the custody of the firm; otherwise, all the members of a firm would in all cases be liable to those beneficially interested therein for trust moneys improperly employed by one partner in the business, or on account of the partnership. This, however, is not the case (Part. Act,

1890, s. 13); in order to fix the other partners with liability, notice of the breach of trust must be brought home to them individually; for, as a general rule in such cases, the money would not have come into the custody of the firm in the course of its business, and the knowledge of one partner would not affect the others, for the fact to be known would have nothing to do with the business of the firm. It is not within the scope of the implied authority of a partner to constitute himself a constructive trustee, thereby subject his partners to liability in that character (*Mara v. Brown* [1896] 1 Ch. 199).

Partners who are implicated in a breach of trust will be liable, though they may not have employed the trust moneys in the partnership business (*Blyth v. Fladgate*, [1891] 1 Ch. p. 354). The consideration of the circumstances under which persons who are not trustees may be liable for breach of trust, and under which trust funds may be followed and recovered from the persons in whose hands the funds are, belongs to the law of trusts, and the reader is referred to the standard authorities on that subject (Lewin on *Trusts*; Godefroi on *Trusts*). And see article TRUSTS.

(4) *Liability of Partners for Debts and Obligations of their Firm*—(a) *Nature of Liability*.—In the absence of special circumstances, the liability of partners for the debts and obligations of their firm arising *ex contractu* is joint, and not joint and several (Part. Act, 1890, s. 12). *Kendall v. Hamilton*, 1879, 4 App. Cas. 504; and in the case of “hold out,” see *Scarf v. Jardine*, 1882, 7 App. Cas. 345). A partner may, however, render himself separately liable by holding himself out to a creditor as the only member of the firm (*Bonfield v. Smith*, 1844, 12 M. & W. 405), or by the terms of the contract into which he has entered (*Ex parte Harding*, 1879, 12 Ch. D. 557).

The estate of a deceased partner is also severally liable, in a due course of administration, for the debts of his firm, subject, however, to the prior payment of his separate debts (Part. Act, 1890, s. 9; *Hills v. Miller* 1851, 9 Hare, 297, and *infra*). A creditor of the firm has concurrent remedies against the deceased partner and the surviving partners, and makes no difference which remedy he pursues first; but in proceedings against the estate of the deceased partner, the surviving partners must be present at taking the accounts of such estate, and the partnership creditors must not come into competition with the separate creditors of the deceased partner (*In re Hodgson*, 1885, 31 Ch. D. 177; in the case of a foreign firm see *In re Doetsch*, [1896] 2 Ch. 836). The several liability of a deceased partner may be excluded by the special terms of the contract under which the creditor claims (*Sumner v. Powell*, 1816, 2 Mer. 30; Turn. & R. 423; and 16 R. R. 136; *Clarke v. Bickers*, 1845, 14 Sim. 639).

The liability of partners for loss occasioned by any wrongful act or omission, or for the misapplication of money or property for which the firm is liable, is joint and several (Part. Act, 1890, s. 12). As also their liability for any breach of trust imputable to the firm (*Blyth v. Fladgate*, [1891] 1 Ch. p. 353).

(b) *Extent of Liability*.—The extent of the liability of a partner to third parties, in respect of the liabilities of his firm, is unlimited. Moreover, if a judgment is obtained against a firm, the judgment creditor is under no obligation to levy execution against the property of the firm before proceeding against the separate property of the partners. He may (subject to the provisions of the Rules of the Supreme Court, Order 48 A, r. 8) in cases in which the judgment has been obtained in the firm name) levy execution against any one or more of the partners until his judgment

satisfied, leaving all questions of contribution to be settled afterwards between the partners themselves (see *Abbott v. Smith*, 1774, 2 Black. W. 949); and see EXECUTION, *against Partners*, vol. v. at p. 174.

(c) *Duration of Liability.—Commencement.*—The agency of a partner to bind his firm and his copartners commences only with the commencement of the partnership. A person, therefore, who enters into partnership with another, or joins an existing firm, does not thereby become liable to the creditors of his partner or of the firm for anything done before he became a partner (Part. Act, 1890, s. 17 (1); *Saville v. Robinson*, 1792, 4 T. R. 720; *Gabriel v. Evill*, 1842, 9 Mee. & W. 297). Even if the incoming partner has agreed with his copartners that, as between themselves, the partnership shall be deemed to have commenced at an earlier date, or that the debts of the old firm shall be taken over by the new, this is not of itself sufficient to give creditors, who are no parties to the agreement, any right to sue the new partner for anything done before he in fact became a partner (*Vere v. Ashby*, 1829, 10 Barn. & Cress. 288); to give the creditors this right, there must be some agreement to that effect between the new partners and the creditors (*Rolfe v. Flower*, 1865, L. R. 1 P. C. 27). The Court appears to imply such an agreement somewhat readily if there be any evidence to support it (*ibid.*, and *Ex parte Jackson*, 1790, 1 Ves. Jun. 131, and 1 R. R. 91; *Ex parte Williams*, 1817, Buck, 13). An incoming partner will, however, be liable for new debts arising after he has joined the firm, under a continuing contract entered into with the firm before that time (*Dyke v. Brewer*, 1849, 2 Car. & Kir. 828).

Termination of Liability.—(i.) *As to the Future.*—Speaking generally, a person who deals with an agent, and knows that he has authority to act for his principal, is entitled to assume the continuance of that authority until he has notice of its revocation, unless such revocation is caused by the death of the principal (*Blades v. Free*, 1829, 9 Barn. & Cress. 167). Consequently, with the exceptions hereafter mentioned, a partner, in order to terminate his liability for the future acts of his partners, must not only cease to be a partner, but must also give due notice of this fact (Part. Act, 1890, s. 36).

No such notice is necessary to terminate his liability for the future in the case of his death, or of his bankruptcy, or if he be a “dormant” partner, that is, a person not known to be a partner (*ibid.*, s. 36 (3)). When a dormant partner ceases to be a member of the firm, the real authority of his copartners to bind him is thereby withdrawn, and as *ex hypothesi* no one knows of the authority, no one is entitled to rely upon its continuance (*Carter v. Whalley*, 1830, 1 Barn. & Adol. 14; *Heath v. Sansom*, 1832, 4 *ibid.*, 172). If, however, a person not generally known to have been a partner is known to have been a partner to certain individuals, he is not a dormant partner as to them, and notice of his retirement must be given them (Part. Act, 1890, s. 13 (3); *Farrar v. Deflinne*, 1843, 1 Car. & Kir. 580).

When notice is necessary, an advertisement in the *Gazette* is sufficient as to persons who have had no dealings with the firm (s. 36 (2)); but old customers are entitled to more specific notice (*Graham v. Peake*, 1792, 1 Pea. 208, and 3 R. R. 671). If in any case notice, in point of fact, is established, it will be sufficient (see *Rooth v. Quin*, 1819, 7 Price, 193, and 21 R. R. 744; *Barfoot v. Goodall*, 1811, 3 Camp. 147).

Any partner may give notice of the dissolution of the firm, or of his retirement therefrom, and may require his copartners to concur for that purpose in all necessary or proper acts which cannot be done without

their concurrence (Part. Act, 1890, s. 37; *Hendry v. Turner*, 132 Ch. D. 355; *Troughton v. Hunter*, 1854, 18 Beav. 470).

As a general rule, a partner is not liable for the acts of his for partners after the dissolution of his firm, or his retirement from it, due notification (when necessary) of the fact (*Ex parte Central Ban London*, [1892] 2 Q. B. 633; *Abel v. Sutton*, 1800, 3 Esp. 108, and 6 F. 818). The recent case of *Court v. Berlin* ([1897] 2 Q. B. 396), in which solicitor, retained by a firm to bring an action for the recovery of a partnership debt, recovered from retired partners costs incurred after their retirement, is not inconsistent with this rule; for the liability in that was really incurred before their retirement, namely, when the solicitor retained (cp. the converse case, *Dyke v. Brewer*, 1849, 2 Car. & Kir. 828).

If a partner has, notwithstanding the dissolution, given his partnership authority to act for him, he will be bound by anything done by them within the limits of such authority (as in *Burton v. Issitt*, 1821, 5 Barn. & Ald. 2; *Smith v. Winter*, 1838, 4 Mee. & W. 454; and see Lindley on Partners p. 225).

Moreover, after a dissolution, the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue, notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but not finished at the time of the dissolution, but not otherwise (Part. Act, 1890, s. 3). Thus, after a dissolution a partner can sell the partnership assets (*Forbes v. Hanbury*, 1776, Cowp. 445), or pledge them for the purpose of completing a transaction already commenced (*Butchart v. Dresser*, 1853, 4 De G., M. & G. 542), or of securing a debt already incurred (*In re Clough*, 1885, 12 Ch. D. 325). This authority does not extend to a bankrupt partner, for a firm is in no case bound by the acts of a bankrupt partner (Part. Act, 1890, s. 38; *Craven v. Edmonson*, 1830, 6 Bing. 734, and 31 R. R. 529; *Bank. Act*, 1883, s. 49 (a); *Dickins v. Cross*, 1830, 1 Barn. & Adol. 3; though any person who has after the bankruptcy represented himself or suffered himself to be represented, as a partner of the bankrupt, may be liable for his acts (Part. Act, 1890, s. 38; *Lacy v. Woolcott*, 1823, 1 Dow. & Ry. K. B. 458).

A partner, after his retirement, may become liable for the acts of his former partners, under the doctrine of holding out (see *ante*, p. 456).

The estate of a deceased partner may be liable for debts incurred at his death, at the suit of the surviving partners, if there was any agreement to that effect between them. Moreover, if the deceased partner had authorised his executors to carry on his business in partnership with his former partners, and appropriated a part of his estate for that purpose, and his executors do go into partnership, creditors of the firm subsequent to his death will be able to get payment of their debts out of such part of the estate, by availing themselves of the executor's right of indemnity therefor (*Douse v. Gorton*, [1891] App. Cas. 190; *In re Johnson*, 1880, 15 Ch. D. 54; but the creditors have no such right unless a portion of his estate has been so appropriated (*Strickland v. Symons*, 1884, 26 Ch. D. 245; *In re Eva*, 1887, 34 Ch. D. 597).

(ii.) *As to the Past.*—With regard to a partner's liability for past acts of a partner who retires from a firm does not thereby cease to be liable for the partnership debts and obligations incurred before his retirement (Part. Act, 1890, s. 17 (2)). Nor will death release the estate of a deceased partner from liabilities incurred during his life (see *ante*, p. 466), except such as arise from mere torts, to which the maxim *actio personalis moritur cum*

persona applies (see article thereon); this maxim does not apply to breaches of trust or negligence in performing a duty arising out of a contract (*Smith v. Blyth*, [1891] 1 Ch. p. 366; *Sawyer v. Goodwin*, 1867, 36 L. J. Ch. N. S. 578; Lindley on *Partnership*, p. 611). It is necessary, therefore, to consider shortly the more important ways by which a partner or the estate of a deceased partner may be freed from such liability.

Bankruptcy.—The bankruptcy of a partner and his subsequent discharge will, subject to the exceptions in the Bankruptcy Acts (see Bank. Act, 1883, s. 30), release him from his liabilities as a partner (*Ex parte Hammond*, 1873, L. R. 16 Eq. 614), but the bankruptcy and discharge of his copartners only will not have this effect (*ibid.*, s. 30 (4)).

Payment.—An obligation, whether it be joint or joint and several, is discharged if performed by any one of the persons obliged (see *Beaumont v. Greathead*, 1846, 2 C. B. 494); therefore payment of a partnership debt by any one partner will discharge all the rest, unless, indeed, the partner who pays the debt pays it out of his own moneys and in such a way as to show his intention to keep the debt alive as against the firm (*M'Intyre v. Millar*, 1845, 13 Mee. & W. 725).

In considering discharge by payment, attention must be paid to the general rules relating to the appropriation of payments (see article on APPROPRIATION OF PAYMENTS, and Lindley on *Partnership*, p. 234 *et seq.*), and especially to the rule in *Clayton's* case (1816, 1 Mer. 572, and 15 R. R. 161), which is that where there is one single open current account (*Cory Brothers & Co. v. Owners of the Mecca*, [1897] App. Cas. 286) between two parties, every payment which cannot be shown to have been made in discharge of some particular item, is imputed to the earliest item standing to the debit of the payer at the time of payment. The application of this rule will discharge from liability the estate of a deceased partner (*Clayton's* case, *ubi supra*) and a retired partner, whether known (*Hooper v. Keay*, 1875, 1 Q. B. D. 178) or dormant (*Brooke v. Enderby*, 1820, 2 Brod. & B. 70, and 22 R. R. 653; *Newmarch v. Clay*, 1811, 14 East, 239). The discharge, being a discharge by payment, does not depend on the knowledge of the creditor of the change in the firm (see *ibid.*).

The rule in *Clayton's* case applies against the debtor as well as in his favour, so that a debtor who has made a general payment in respect of a single current account cannot subsequently apply those payments in discharge of the later instead of the earlier items in the account, consequently the assets of a new firm may, by the application of the rule, be appropriated to the payment of the debts of an old firm (*Beale v. Caddick*, 1857, 2 H. & N. 326); but this cannot be done to the prejudice of a new partner without his consent, express or tacit (*Burland v. Nash*, 1861, 2 F. & F. 687).

Moreover, when a change takes place in a firm, the creditor is not obliged to consent to the carrying over of his account with the old firm to that of the new; he may keep the two accounts separate, and the rule will then be excluded (*Simson v. Ingham*, 1823, 2 Barn. & Cress. 65, and 26 R. R. 273).

This rule, like the other rules relating to the appropriation of payments, is not a rigid rule of law, but depends upon the intention of the parties, expressed, implied, or presumed (*Cory Brothers v. Owners of the Mecca*, [1897] App. Cas. 286; *Hallett's* case, 1879, 13 Ch. D. 696); consequently it will not be applied against a creditor in respect of a fraud, committed on him, of which he is ignorant (*Clayton's* case, 1816, 1 Mer. 572, and 15 R. R. 161; *Lacey v. Hill*, 1876, 4 Ch. D. 537; *affd. sub nom. Read v. Bailey*, 1877,

L. R. 3 App. Cas. 94; see, too, *Wickham v. Wickham*, 1855, 2 Kay & 478).

Release.—When several persons are bound jointly or jointly severally, a release of one is a release of them all (*Bower v. Swadlin*, 11 1 Atk. 294; *Cheetham v. Ward*, 1797, 1 Bos. & Pul. 630, and 4 R. R. 7 and as to torts, *Duck v. Mayeu*, [1892] 2 Q. B. 511); hence a release of partner from a partnership liability, whether it arises from contract or t discharges all the others. But a covenant not to sue one partner has this effect (*Hutton v. Eyre*, 1815, 6 Taun. 289, and 16 R. R. 619; *Duci Mayeu*, *ubi supra*); and a release so drawn as to show that it is intended enure only for the benefit of the releasee personally, is equivalent t covenant not to sue (*Solly v. Forbes*, 1820, 2 Brod. & B. 38, and 22 R. 641; *Price v. Barker*, 1855, 4 El. & Bl. 760; *Duck v. Mayeu*, *ubi supra*). however, the debt be in fact released, any attempt to reserve a right action against other parties in respect of it will be futile (*Commercial B. of Tasmania v. Jones*, [1893] App. Cas. 313).

Novation.—A retiring partner may be discharged from any exist liabilities of the firm by an agreement to that effect between himself the members of the firm as newly constituted and the creditors, and t agreement may be either express or inferred as a fact from the cours dealing between the creditors and the firm as newly constituted (P Act, 1890, s. 17 (3)). The same principle is applicable to the discharg the estate of a deceased partner.

The difficulty in applying this rule is one of fact, whether such agreement as is here mentioned has or has not been entered into; the n retirement of a partner raises no presumption in favour of such an ag ment (*Lyth v. Ault*, 1852, 7 Ex. Rep. 669; *Benson v. Hadfield*, 1844 Hare, p. 37). The cases to be found in the books illustrating this rule very numerous, and their effect may be and has been (Lindley on *Part ship*, p. 248 *et seq.*) stated as follows:—

An express agreement by the creditor to discharge a retired part and to look only to a continuing partner, is not inoperative for want consideration (*Thompson v. Percival*, 1834, 5 Barn. & Adol. 925, overruli on this point, *Lodge v. Dicus*, 1820, 3 Barn. & Ald. 611, and 22 R. R. 49).

An adoption by the creditor of the new firm as his debtor does not any means necessarily deprive him of his rights against the old firm, eit at law or in equity (*David v. Ellice*, 1826, 5 Barn. & Cress. 196, and R. R. 497; *Thompson v. Percival*, *ubi supra*; *Heath v. Percival*, 1720, 1 Wms. 682; *Kirwan v. Kirwan*, 1834, 2 C. & M. 617; *Blew v. Wyatt*, 18 5 Cr. & Ph. 397; *Gough v. Davies*, 1817, 4 Price Ex. 200, and 18 R. R. 6 in equity compare *Head v. Head*, [1893] 3 Ch. 426, with *ibid.* (No. [1894] 2 Ch. 236; *Daniel v. Cross*, 1796, 3 Ves. Jun. 277, and 3 R. R. *Sleech's* case, 1816, 1 Mer. 539, and 15 R. R. 155; *Clayton's* case, 181 Mer. 579, and 15 R. R. 161; *Palmer's* case, 1816, 1 Mer. 623, and 15 R. 171; *Braithwait v. Britain*, 1836, 1 Keen, 206; *Harris v. Farwell*, 1851, Beav. 31; *Oakford v. European, etc., Ship Co.*, 1863, 1 Hem. & M. 182).

And it will certainly not do so if, by expressly reserving his ri against the old firm, he shows that, by adopting the new firm, he did intend to discharge the old firm (*Bedford v. Deakin*, 1818, 2 Barn. & 210; *Jacomb v. Harwood*, 1721, 2 Ves. 265).

And by adopting a new firm as his debtor, a creditor cannot be regar as having intentionally discharged a person who was a member of the firm, but was not known to the creditor so to be (*Robinson v. Wilkin* 1817, 3 Price, 538, and 18 R. R. 659).

But the fact that a creditor has taken from a continuing partner a new security for a debt due from him and a retired partner jointly, is strong evidence of an intention to look only to the continuing partner for payment (*Evans v. Drummond*, 1801, 4 Esp. 89; *Reed v. White*, 1804, 5 Esp. 122).

And a creditor who assents to a transfer of his debts from an old firm to a new firm, and goes on dealing with the latter for many years, making no demand for payment against the old firm, may not unfairly be inferred to have discharged the old firm (*Ex parte Kendall*, 1811, 17 Ves. Jun. 522, and 11 R. R. 122; *Hart v. Alexander*, 1837, 2 Mee. & W. 484; *Brown v. Gordon*, 1852, 6 Beav. 302; *Wilson v. Lloyd*, 1873, L. R. 16 Eq. 60). But the small number of cases in which relief has been refused, compared with those in which it has been granted, shows that the leaning of the Court is strongly in favour of the creditor.

To this statement it should be added, that if a partner retires from a firm, and his copartners agree to indemnify him against its liabilities, so that as between themselves he becomes a surety only for such liabilities, and this is known to a creditor, the late partner will, like any other surety, be discharged, if time be given by such creditor to the continuing partners, without reserving his rights against the late partner (*Rouse v. Bradford Banking Co.*, [1894] App. Cas. 586; *Oakeley v. Pasheller*, 1836, 4 Cl. & Fin. 212; *Overend, Gurney, & Co. v. Oriental Financial Corporation*, 1874, L. R. 7 H. L. 348).

Judgment.—If a joint creditor of a firm obtains judgment in an action brought against one or some of the partners only, he loses his remedy against the other partners, although he did not know of their existence, and the judgment remains unsatisfied (*Kendall v. Hamilton*, 1879, 4 App. Cas. 504; *King v. Hoare*, 1844, 13 Mee. & W. 494; *Hammond v. Schofield*, [1891] 1 Q. B. 453; and as to partners by estoppel, *Scarf v. Jardine*, 1882, 7 App. Cas. 345; but when the first action has been brought on a bill of exchange, see *Wegg Prosser v. Evans*, [1895] 1 Q. B. 108, overruling *Cambefort v. Chapman*, 1887, 19 Q. B. D. 229). This rule, however, does not apply in favour of partners who were out of the jurisdiction when the first action was brought (*Wilson, Sons, & Co. v. Balcarres Brook Steam Co.*, [1893] 1 Q. B. 422, and 19 & 20 Vict. c. 97, s. 11); nor in relief of the estate of a deceased partner (*ante*, p. 466; *In re Hodgson*, 1885, 31 Ch. D. 177). With respect to obligations which are joint and several, such an obligation, if arising *ex delicto*, is extinguished by a judgment recovered against any one of the persons obliged (*Brinsmead v. Harrison*, 1872, L. R. 7 C. P. 547); but if arising *ex contractu* or out of a breach of trust, it is not extinguished unless such judgment be satisfied (*Blyth v. Fladgate*, [1891] 1 Ch. p. 353; *Lechmere v. Fletcher*, 1833, 1 C. & M. 623; *King v. Hoare*, 1844, 13 Mee. & W. 494).

Statutes of Limitation.—Lastly, the liability of a partner, or of the estate of a deceased partner, may be barred by the Statutes of Limitation. For information on this subject the reader is referred to Darby and Bosanquet on the *Statutes of Limitations*, and Hewitt on the same subject. Here it will be sufficient to notice, that since the Mercantile Law Amendment Act (19 & 20 Vict. c. 97, s. 13) an acknowledgment of a debt in writing by an agent has the same effect in taking the case out of the statutes as such an acknowledgment by the principal; hence it is apprehended that an acknowledgment in writing by one partner, during the continuance of the partnership, will be regarded as an acknowledgment by the firm, and (notwithstanding sec. 14 of the Act) a part payment by a partner will probably

be regarded as a part payment by the firm (see *Watson v. Woodman*, 18 L. R. 20 Eq. p. 730). But after a dissolution a part payment or acknowledgment by a continuing or surviving partner will not prevent a retirement (*ibid.*, 721), or the executors of a deceased partner (*Thompson Waithman*, 1856, 3 Drew. 628), from availing themselves of the statute unless the continuing partner has, in fact, authority from his late partner make such acknowledgment or payment on his account (*In re Tuel* [1894] 3 Ch. 429).

3. RELATION OF PARTNERS TO ONE ANOTHER.

The mutual rights and duties of partners are generally regulated, to certain extent, by special agreement, which usually assumes the form of partnership articles. Any question arising between partners as to their mutual rights and liabilities which is provided for by special agreement must be decided by such agreement; but if it be not provided for, recourse must be had to the general law relating to this subject (*Smith v. Jeff*, 1841, 4 Beav. 505), which, for the most part, is now contained in the Partnership Act, 1890 (ss. 19–31). These rights and duties, whether ascertained by agreement or defined by the Act, may be varied by the consent of all the partners, and such consent may be either expressly inferred from a course of dealing (*ibid.*, s. 19, and *Const v. Harris*, 18 Turn. & R. 496, and 24 R. R. 108; *England v. Curling*, 1844, 8 Beav. 12; *Coventry v. Barclay*, 1864, 3 De G., J. & S. 320; *Geddes v. Wallace*, 1820 Bli. 270, and 21 R. R. 66).

(1) *Conduct of the Partnership Business.*—Subject to any agreement between the partners, every partner may take part in the management of the partnership business (Part. Act, 1890, s. 24 (5)), even if he has mortgaged his share therein to one of his copartners (*Rowe v. Wood*, 1882, 2 Jac. & W. 558, and 22 R. R. 208; see, too, Part. Act, 1890, s. 31). No partner is not entitled to remuneration for services rendered to his firm (*ibid.*, s. 24 (6); *Thornton v. Proctor*, 1792, 1 Anst. 94, and 3 R. R. 55; *Robinson v. Anderson*, 1855, 20 Beav. 98), except, perhaps, for extra work or trouble imposed upon him through the wilful neglect of the partnership business by his copartner (*Airey v. Borham*, 1861, 29 Beav. 620). When a partner has died or retired, and his former partners have continued to carry on the business for his and their benefit, the continuing partners will if profits are derived from the carrying on of the business (*In re Aldrid* [1894] 2 Ch. 97), and in the absence of any special reason to the contrary (as when they are executors of the deceased partner, *Burden v. Burd*, 1813, 1 Ves. & Bea. 170, and 12 R. R. 210; *Stocken v. Dawson*, 1843, 6 Beav. 371), be entitled in the final settlement of accounts to some compensation for their trouble (*Brown v. De Tastet*, 1821, Jac. 284, and 23 R. R. 5; *Featherstonhaugh v. Turner*, 1858, 25 Beav. 382; in a case of lunacy *Mellersh v. Keen*, 1859, 27 Beav. 242; as to a partner who is a receiver *Harris v. Sleep*, [1897] 2 Ch. 80).

Any difference arising between partners as to ordinary matters connected with the partnership business, and unaffected by any special agreement, may be decided by the majority (Part. Act, 1890, s. 24 (8)). The decision of the majority, to be binding on the minority, must be arrived at in good faith and for the benefit of the firm. Every partner has a right to be consulted, and to express his views and have them considered (*Const v. Harris*, 1824, Turn. & R. 525, and 24 R. R. 108; *Blisset v. Daniel*, 1853, Hare, 493). If in such matters the partners are equally divided, it seems that those who forbid a change must have their way—in *re communi pot*

est conditio prohibentis (and see *Donaldson v. Williamson*, 1833, 1 C. & M. 345; *Clements v. Norris*, 1878, 8 Ch. D. 129).

No change may be made in the business of the partnership without the consent of the partners (Part. Act, 1890, s. 24 (8); *Natusch v. Irving*, 1824; Gow on *Partnership*, 3rd ed., App. p. 398; Lindley on *Partnership*, 5th ed., p. 316; *Const v. Harris*, *ubi supra*); nor may any person be introduced as a partner without such consent (Part. Act, 1890, s. 24 (7)). No majority of partners can expel any partner, unless a power to do so has been conferred by express agreement between the partners (*ibid.*, s. 25; *Wood v. Woad*, 1874, L. R. 9 Ex. 190; *Blisset v. Daniel*, 1853, 10 Hare, 493). A power of expulsion, when it exists, is always construed strictly; no expulsion under it will be effectual unless the partners have acted strictly in accordance with the power and with perfect good faith (*Clarke v. Hart*, 1858, 6 Cl. H. L. 633; *Stewart v. Gladstone*, 1879, 10 Ch. D. 626; *Labouchere v. Wharmcliffe*, 1879, 13 Ch. D. 346; *Barnes v. Youngs*, [1898] 1 Ch. 414. As to damages, see *Wood v. Woad*, *ubi supra*).

(2) *Duty to observe Good Faith*.—Partners are bound in all their dealings with each other to observe the utmost good faith, and to act for the benefit of the common body. Good faith requires that a partner shall not obtain a private advantage at the expense of the firm; hence every partner must account to the firm for any benefit derived by him, without the consent of the other partners, from any transaction concerning the partnership, *e.g.* from purchases or sales on behalf of the firm (*Bentley v. Craven*, 1853, 18 Beav. 75; *Dunne v. English*, 1874, L. R. 18 Eq. 524; *Carter v. Horne*, 1728, 1 Abr. Ca. Eq. 7), or from any use by him of the partnership property, name, or business connection (Part. Act, 1890, s. 29; *Gardner v. McCutcheon*, 1842, 4 Beav. 534; *Russell v. Austwick*, 1826, 1 Sim. 52, and 27 R. R. 157). So, too, if a partner obtains in his own name a renewal of a lease of the partnership property, the new lease will be treated as part of the assets of the partnership (*Featherstonhaugh v. Fenwick*, 1810, 17 Ves. Jun. 298, and 11 R. R. 77; *Clegg v. Fishwick*, 1849, 1 Mac. & G. 294), whether his partners knew of his intention to obtain the new lease or not (*Clegg v. Edmonson*, 1857, 8 De G., M. & G. 787). This rule applies not only between partners, but also between persons who have agreed to become partners (*Fawcett v. Whitehouse*, 1829, 1 Russ. & M. 132, and 32 R. R. 163), and to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs have been completely wound up (*ibid.*, s. 29 (2); *Clements v. Hall*, 1857, 2 De G. & J. 173; *Alder v. Fouracre*, 1818, 3 Swans. 489, and 19 R. R. 256). Moreover, in order that a partner may retain any benefit from a transaction concerning the partnership, he must not only have disclosed to his partners the fact that he was interested in that transaction, but also the extent of his interest (*Dunne v. English*, *ubi supra*; *Imp. Mercantile Credit Association v. Coleman*, 1873, L. R. 6 H. L. 189).

If a partner, without the consent of the other partners, carries on any business of the same nature as, and competing with, that of the firm, he must account for and pay over all profits made by him in that business (Part. Act, 1890, s. 30; *Lock v. Lynam*, 1854, 4 Ir. Ch. 188). He is not bound to account for any profits made by him in a business which does not compete with that of his firm (*Aas v. Benham*, [1891] 2 Ch. 244; *Dean v. MacDowell*, 1877, 8 Ch. D. 345), though he may be restrained from using the partnership name or property for such business (*Aas v. Benham*, *ubi supra*; *Glassington v. Thwaites*, 1822, 1 Sim. & St. 124, and 24 R. R. 153), or from carrying it on, if he has agreed not to do so.

(3) *Partnership Property*.—The expression “partnership property” denotes everything to which all the partners are entitled *as partners*; persons may be entitled to property jointly or in common and may all be partners, yet that property may not be partnership property (*Morris Barrett*, 1829, 3 Y. & J. 384; Part. Act, 1890, s. 20 (3)). Whether a particular property is or is not partnership property depends upon the agreement between the partners, and, in the absence of any express agreement, upon the circumstances under which it was acquired.

All property originally brought into the partnership stock, or subsequently acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business is partnership property (Part. Act, 1890, s. 20 (1)). So also is property bought with money belonging to the firm, unless the contrary be shown (*ibid.*, s. 21). For instance, land (*Smith v. Smith*, 1800, 5 Ves. Jun. 19 and 5 R. R. 22; see too *In re Streetfield, Lawrence, & Co.*, 1861, 3 De G. & J. 645) or shares (*Ex parte Hinds*, 1863, 3 De G. & Sm. 603), though bought by or standing in the name of one partner only, will be partnership property if paid for out of partnership moneys, unless the partner can show that he holds such property for himself alone, as by showing that he purchased it out of moneys lent to him by the firm for the purpose (*Smith v. Smith, ubi supra*). As to property acquired after a dissolution but before a final settlement of accounts, see *Nerot v. Burnand*, 1844 Russ. 247; 2 Bli. N. S. 215, and 28 R. R. 65.

The goodwill of the partnership business, in so far as it has a saleable value, is *prima facie* partnership property (*Wedderburn v. Wedderburn* 1856, 22 Beav. p. 104).

Property may, however, be used for partnership purposes and yet the agreement remain the separate property of one of the partners (*e.g.* colliery lease, *Burdon v. Barkus*, 1862, 4 De G., F. & J. 42; office furniture, *Ex parte Owen*, 1851, 4 De G. & Sm. 351; trade utensils, *Ex parte Smith*, 1813 3 Madd. 63); but if it be brought into the common stock as part of a partner's capital, it becomes partnership property, and any increase in value will belong to the firm (*Robinson v. Ashton*, 1875, L. R. 20 Eq. 25).

The cases of most difficulty are those in which co-owners are partners in profits derived from their common property. If in such cases the property acquired, whether by devise (*Crawshay v. Maule*, 1818, 1 Swans. 495, and 18 R. R. 126) or otherwise (*Feraday v. Wightwick*, 1829, Tambl. 25 *Waterer v. Waterer*, 1873, L. R. 15 Eq. 402), for the purposes of being worked in partnership, or is merely accessory to and involved in the partnership trade (*Jackson v. Jackson*, 1804, 9 Ves. Jun. 591; *Davies Games*, 1879, 12 Ch. D. 113), the property will be partnership property otherwise not (*Brown v. Oakshot*, 1857, 24 Beav. 254; *Steward v. Blakewell* 1869, L. R. 4 Ch. 603; *Davis v. Davis*, [1894] 1 Ch. 393).

If co-owners of land, not being partnership property, are partners as to the profits made by the use of such land, and purchase other land out of the profits, to be used in like manner, the land so purchased belongs to them, in the absence of agreement to the contrary, as co-owners and not as partners (Part. Act, 1890, s. 20 (2)). The facts may, however, show that the acquired land is partnership property, though the original land is not (*Morris v. Barrett*, 1829, 3 Y. & J. 384).

The firm may have a claim for moneys expended on the separate property of a partner (*Parvsey v. Armstrong*, 1881, 18 Ch. D. 698; *Burdon v. Barkus*, 1862, 4 De G., F. & J. 42).

It is competent to partners, by a completely executed (*Ex parte*

Wheeler, 1817, Buck, 25; *Ex parte Wood*, 1879, 10 Ch. D. 554) and honest (*Ex parte Rowlandson*, 1813, 1 Rose, 416; *In re Kemptner*, 1869, L. R. 8 Eq. 286) agreement amongst themselves, to convert that which was partnership property into the separate property of an individual partner, and *vice versâ* (*Ex parte Ruffin*, 1801, 6 Ves. Jun. 119, and 5 R. R. 237; *Ex parte Williams*, 1805, 11 Ves. Jun. 3, and 8 R. R. 62).

The interest of partners in the partnership property is either that of tenants in common or joint tenants without benefit of survivorship (if, indeed, there is any difference between the two). No partner has a right to take any portion of such property and say that it is his exclusively (*Lingen v. Simpson*, 1824, 1 Sim. & St. 600, and 24 R. R. 249).

The legal estate in any land which belongs to the partnership devolves according to the general law, but in trust so far as necessary for the persons beneficially interested therein (Part. Act, 1890, s. 20 (2)).

As between the partners (including the representatives of a deceased partner) and as between the heirs of a deceased partner and his executors or administrators, any land or interest in land which has become partnership property is treated as personal estate, unless the contrary intention appears (Part. Act, 1890, s. 22). Since this rule rests upon the general right of a partner and his representatives to have the partnership property sold on the determination of the partnership, and upon the equitable doctrine of conversion, it is apprehended that a contrary intention would appear if there were an agreement that the land should not be sold (*In re Wilson*, [1893] 2 Ch. 340; *Steward v. Blakeway*, 1869, L. R. 4 Ch. 303).

Probate duty (*A.-G. v. Hubbuck*, 1883, 13 Q. B. D. 275) and legacy duty (*Forbes v. Steven*, 1870, L. R. 10 Eq. 178) are payable on the share of a deceased partner in partnership real estate. (As to Mortmain Acts, see *Ashworth v. Munn*, 1878, 15 Ch. D. 363, and the Statute of Frauds, *Gray v. Smith*, 1889, 43 Ch. D. 208.)

(4) *Shares in a Partnership*—(a) *Their Nature*.—The share of a partner in the partnership property at any given time is the proportion of the then existing assets to which he would be entitled if the whole were realised and converted into money, and after all the then existing debts and liabilities of the firm had been discharged (Pollock, *Digest of the Law of Partnership*, p. 69).

(b) *Presumed Equality of Partners' Shares*.—Subject to any agreement, express or implied, between the partners, and in the absence of evidence (*Stewart v. Forbes*, 1849, 1 Mac. & G. 137) from which any satisfactory conclusion as to what was agreed can be drawn, all partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm (Part. Act, 1890, s. 24 (1); *Peacock v. Peacock*, 1808, 16 Ves. Jun. 49, and 10 R. R. 138; *Copland v. Toulmin*, 1840, 7 Cl. & Fin. 349; *Robinson v. Anderson*, 1855, 7 De G., M. & G. 239).

The fact that the partners contributed capital in unequal shares will not exclude the presumption of equality in profit and loss (see cases *supra*), though it is a matter to be taken into consideration on the final settlement of accounts (Part. Act, 1890, s. 44).

If it has been agreed that profits shall be divided in certain proportions, the inference, in the absence of evidence to the contrary, is that losses are to be shared in the same proportion (per Jessel, M. R., in *Albion Life Assurance Society*, 1880, 16 Ch. D. p. 87, and s. 44 (a)).

Where some partners have retired and the others have taken over their shares, the inference, in the absence of evidence, is that the continuing

partners took the shares of the retiring members in the proportion in which the continuing partners were interested in the business before such retirement (*Robley v. Brooke*, 1833, 7 Bli. N. S. 90; *Copland v. Toulmin*, 1867 Cl. & Fin. 349).

Where a firm, say of two persons, enters into a partnership transaction with a person who is not a member of the firm, if the two partners enter into the speculation as a firm, the profits and losses will be divided equal in two parts, but if they entered into it as two individuals, the profits and losses will be shared equally between all three (*Warner v. Smith*, 1861 De G., J. & S. 337).

(c) *Liability of, for Partners' Separate Debts.*—No writ of execution can now be issued against any partnership property except on a judgment against the firm (Part. Act, 1890, s. 23). If a judgment creditor of a partner wishes to enforce his judgment against that partner's interest in the partnership property and profits, he must obtain an order charging the same with payment of his debt and interest (Part. Act, 1890, s. 23; Rules of Supreme Court, Order 46, rr. 1a and 1b). The Court which makes the order must appoint a receiver of the partner's share of the profits, and of any other money coming to him in respect of the partnership, and may direct and give all accounts, inquiries, orders, and directions which might have been directed or given if the charge had been made by the partner (*ibid.*). In the absence of special circumstances, the Court will not order the other partners to render partnership accounts to the judgment creditor during the continuance of the partnership (see *ibid.*, s. 31; *Brown, Janson, & Co. Hutchinson & Co.*, [1895] 2 Q. B. 126).

The Court may order a sale of the partner's share; if a sale be ordered the other partners are at liberty to purchase (*ibid.*, s. 23 (3)). The other partners have also the right *at any time* to redeem the charge (*ibid.*, *quære* this would deprive the judgment creditor of his right to foreclose them such right exist).

Probably a charging order could be obtained under this section upon the share of a lunatic partner (*In re Leavesley*, [1891] 2 Ch. 1; *Horne v. Pountney*, 1889, 23 Q. B. D. 264).

(d) *Transfer of Shares.*—A partner cannot assign his share in the partnership so as to give his assignee the rights of a partner without the consent of all the members of the firm (Part. Act, 1890, s. 24 (7)), but such consent may be given once for all by the original partnership agreement (*Fox v. Clifton*, 1832, 9 Bing. 119; *Lovegrove v. Nelson*, 1833 Myl. & K. 1).

It is not unusual to make provision in partnership articles that on the death of a partner his executors, or son, or some other person nominated in the articles or to be nominated hereafter, shall take his place. The effect of any such provision must depend on its words; but, speaking generally, clauses of this kind, though they bind the surviving partners to let in the person nominated (*Wainwright v. Waterman*, 1791, 1 Ves. Jun. 311), do not bind him to come in, but give him an option whether he will do so or not (*Downs v. Collins*, 1848, 6 Hare, 418; *Madgwick v. Wimble*, 1843, 6 Bea. 495; *Pigott v. Bagley*, 1825, McCle. & Yo. 569, and 29 R. R. 850; see too *Page v. Cox*, 1851, 10 Hare, 163). Before making up his mind, he is entitled to make himself acquainted with the partnership affairs (*Pigott v. Bagley supra*). If he desires to come in, he must comply strictly with the terms upon which he is entitled to do so (*Holland v. King*, 1848, 6 C. B. 72; *Brooke v. Garrod*, 1857, 2 De G. & J. 62). Even if the agreement is absolute that the person nominated shall come in, it cannot be specific

enforced, though his refusal to come in may make the covenantor or his estate liable in damages (*Downs v. Collins*, 1848, 6 Hare, 418).

The assignment of a share by one partner, without the consent of his copartners, whether such assignment be absolute or by way of mortgage or redeemable charge, is by no means inoperative; for, though it does not, as against the other partners, entitle the assignee during the continuance of the partnership to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, it does entitle him to receive the share of the profits to which the assigning partner would otherwise be entitled, though he must accept the account of profits agreed to by the partners; and in the case of a dissolution, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution (Part. Act, 1890, s. 31; as to the rights of a mortgagee of a share in a partnership as against the trustee in the bankruptcy of the mortgagor, see *Ex parte Collins*, [1894] 1 Q. B. 425).

(5) *Contribution and Indemnity between Partners.*—Since every partner is the agent of the firm for the purpose of carrying on the partnership business in the usual way (Part. Act, 1890, s. 5; and *ante*, p. 461), it follows from the ordinary rules of principal and agent that the firm must indemnify every partner in respect of payments made and personal liabilities incurred by him in the ordinary and proper conduct of the business of the firm (Part. Act, 1890, s. 24 (2) (a); *Robinson's Executor's case*, 1856, 6 De G., M. & G. 572; *Croxtton's case*, 1852, 5 De G. & Sm. 432; *Burden v. Burden*, 1813, 1 Ves. & Bea. 170, and 12 R. R. 210; *Lefroy v. Gore*, 1844, 1 Jo. & Lat. 571).

A partner is also entitled to be indemnified by the firm in respect of payments and liabilities made or incurred by him in or about anything necessarily done for the preservation of the business or property of the firm (*ibid.*, s. 24 (2) (b); *Ex parte Chippendale*, 1854, 4 De G., M. & G. 52; *Burdon v. Barkus*, 1862, 4 De G., F. & J. 42). This right arises *quasi ex contractu*, and is analogous to the right of contribution in cases of salvage and average.

A partner's claim to contribution cannot be defeated on the ground of illegality (*Campbell v. Campbell*, 1837, 7 Cl. & Fin. 166), unless the partnership is itself illegal (*Aubert v. Maze*, 1801, 2 Bos. & Pul. 371, and 5 R. R. 624), or unless the act which is the basis of the claim is not only illegal but has been committed by the partner seeking contribution when he knew or ought to have known of its illegality (*Thomas v. Atherton*, 1877, 10 Ch. D. 185).

If all the partners concur in an illegal act, the right to contribution will depend on the general law, and not on any law peculiar to partners. In such cases, see *Adamson v. Jarvis* (1827, 4 Bing. 66, and 29 R. R. 503), *Merryweather v. Nixan* (1799, 8 T. R. 186, and 16 R. R. 810; 1 Smith's *Leading Cases*, 10th ed., p. 383), *The Englishman* ([1895] Prob. 212); and in cases of breach of trust, *Ashurst v. Mason* (1875, L. R. 20 Eq. 225), *Chillingworth v. Chambers* ([1896] 1 Ch. 685), *Robinson v. Harkin* ([1896] 2 Ch. 415).

The fact that the loss incurred is imputable to the conduct of one partner more than to that of the others will not deprive such partner of his right to contribution (*Ex parte Letts & Steer*, 1856, 26 L. J. Ch. N. S. 455; *Cragg*

v. *Ford*, 1842, 1 Y. & C. C. 280), unless the loss be incurred through fraud or culpable negligence (*Bury v. Allen*, 1844, 1 Coll. C. C. 589; *Tho v. Atherton*, 1877, 10 Ch. D. 185; *Robertson v. Southgate*, 1847, 6 Hare, 1; *In re Webb*, 1818, 2 Moo. C. P. 500; *M'Ireath v. Margetson*, 1785, 4 D. K. B. 278).

There will be no right of contribution or indemnity in respect of payments inconsistent with the agreement between the parties (*Thornto Proctor*, 1792, 1 Anst. 94, and 3 R. R. 558), or if the right be excluded agreement (*Ex parte Chippendale*, 1854, 4 De G., M. & G. 52).

The shares in which partners are, as between themselves, bound to contribute to the losses and liabilities of the firm is a matter of agreement between them. If they agree that, as between themselves, they shall be liable beyond a certain sum, no partner can enforce contribution indemnity beyond that sum (*Worcester Corn Exchange*, 1853, 3 De G., M. & G. 180). If they agree that all the losses are to be borne exclusively one or more of their number, those who are to bear the loss cannot call the others who are not to bear it for any contribution (*Geddes v. Wall*, 1820, 2 Bli. 270, and 21 R. R. 66). In the absence of evidence, the presumption is that they are to bear losses equally (*ante*, p. 475).

(6) *Interest on Advances and Capital*.—A partner is not only entitled to be repaid any actual payments or advances made by him for the purpose of the partnership beyond the amount of capital he has agreed to subscribe but is also entitled to interest thereon (Part. Act, 1890, s. 24 (3)), and even though the partners may not have been aware of the outlay (*Ex parte Chippendale*, 1854, 4 De G., M. & G. 36). In the absence of any agreement express or implied (*e.g.* from the custom of the particular trade, *Ferguson Fyffe*, 1840, 8 Cl. & Fin. 121; *Bate v. Robbins*, 1863, 32 Beav. 73; or entered in the partnership books, *Magdalena Steam Navigation Co.*, 1860, John. 66) the rate of interest will be 5 per cent. (Part. Act, 1890, s. 24 (3)).

On the other hand, a partner indebted to the firm in respect of money borrowed or drawn out (*Cooke v. Benbow*, 1865, 3 De G., J. & S. 1; *Meyn v. Meymott*, 1862, 31 Beav. 445; *Rhodes v. Rhodes*, 1860, John. 653), retained by him (*Webster v. Bray*, 1849, 7 Hare, 159), is not chargeable with interest, unless such money has been fraudulently retained (*Hutcheson v. Sm*, 1842, 5 Ir. R. Eq. 117; *Fawcett v. Whitehouse*, 1829, 1 Russ. & M. 132, and 32 R. R. 163) or improperly applied (*Evans v. Coventry*, 1857, 8 De G., & G. 835).

Unless it be otherwise agreed (as in *Miller v. Craig*, 1843, 6 Beav. 42) partners are not entitled to interest on their respective capitals (Part. Act, 1890, s. 24 (4); *Cooke v. Benbow*, 1865, 3 De G., J. & S. 1; *Rishton v. Gris*, 1868, L. R. 5 Eq. 326; *Hill v. King*, 1863, 3 De G., J. & S. 418). Moreover when interest on capital is payable, it will cease on a dissolution (*Wat v. Wells*, 1867, L. R. 2 Ch. 250; *Barfield v. Loughborough*, 1872, L. R. Ch. 1).

As to a partner's right to remuneration for services and compensation for trouble, see *ante*, p. 472.

(7) *Accounts, etc., during the Partnership*.—Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives (Part. Act, 1890, s. 28; *Rowe Wood*, 1822, 2 Jac. & W. p. 558, and 22 R. R. p. 211), but not, during the partnership, to the assignee or mortgagee of a partner's share (*ibid.*, s. 31).

An action for an account may in a proper case be brought during the continuance of the partnership without seeking a dissolution (*Harrison Armitage*, 1819, 4 Madd. 143, and 20 R. R. 284); as, for instance, when the

partnership is for a term of years still unexpired (*Richards v. Davies*, 1831, 2 Russ. & M. 347; *Fairthorne v. Weston*, 1844, 3 Hare, 387), or a partner is seeking to retain a benefit which rightly belongs to the firm (see *Fawcett v. Whitehouse*, 1829, 1 Russ. & M. 132, and 32 R. R. 163; and *ante*, p. 473), or a partner has been wrongfully expelled (*Blisset v. Daniel*, 1853, 10 Hare, 493, where no dissolution was decreed).

Until a partner has been excluded from the partnership, or the partnership has been dissolved, the Statute of Limitations does not begin to run so as to deprive a partner of his right to an account (*Knox v. Gye*, 1871, L. R. 5 H. L. 656; *Noyes v. Crawley*, 1878, 10 Ch. D. 31; and compare *Betjemann v. Betjemann*, [1895] 2 Ch. 474).

A partner may agree to accept accounts prepared by others as correct, and will be bound by his agreement (*Knight v. Majoribanks*, 1848, 2 Mac. & G. 10; *Turney v. Bayley*, 1864, 4 De G., J. & S. 332), unless it be based upon error or tainted with fraud (*Chandler v. Dorsett*, 1679, Fin. 431; *Maddeford v. Austwick*, 1826, 1 Sim. 89, and 27 R. R. 167).

As to the consequences of keeping improper or no accounts, see *Walmsley v. Walmsley*, 1846, 3 Jo. & Lat. 556; *Gray v. Haig*, 1854, 20 Beav. 219; *Ex parte Toulmin*, 1815, 1 Mer. 598, note; *Toulmin v. Copland*, 1839, 3 Y. & C. Ex. 655; *Boddam v. Ryley*, 1787, 4 Bro. P. C. 561).

The partnership books are to be kept at the place of business of the partnership, or the principal place if there is more than one, and every partner may, when he thinks fit, have access to and inspect and copy any of them (Part. Act, 1890, s. 24 (9)). A partner may, however, be restrained from using the information obtained from the partnership books for an improper purpose (*Trego v. Hunt*, [1896] App. Cas. 7).

(8) *Continuance of Partnership after Expiration of Original Term.*—When a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will (Part. Act, 1890, s. 27 (1)). This rule will apply even when the partnership is entered into for a term of years, and the articles provide for events happening *during the term*, or *during this partnership term* (*Essex v. Essex*, 1855, 20 Beav. 442; *Cox v. Willoughby*, 1880, 13 Ch. D. 863). So, too, if three partners carry on business on certain terms, and one of them dies, and the survivors continue to carry on business together, they will be presumed to carry it on on the former terms (*King v. Chuck*, 1853, 17 Beav. 325).

It is not always easy to determine what provisions are or what are not consistent with a partnership at will. It has been decided that a right of expulsion cannot be exercised after the expiration of the original term (*Clark v. Leach*, 1863, 1 De G., J. & S. 409); and it is clear that any clause which prevents a partner from determining the partnership at his will is inapplicable (see Part. Act, 1890, s. 26; *Featherstonhaugh v. Fenwick*, 1810, 17 Ves. Jun. p. 307, and 11 R. R. p. 81; *Neilson v. Mossend Iron Co.*, 1886, L. R. 11 App. Cas. 298).

An arbitration clause (*Gillett v. Thornton*, 1875, L. R. 19 Eq. 599), and clauses in the articles giving a partner the option of purchasing his co-partner's share, are, as a general rule, operative after the expiration of the original term (*Daw v. Herring*, [1892] 1 Ch. 284; *Cox v. Willoughby*, 1880, 13 Ch. D. 863; *Essex v. Essex*, 1853, 20 Beav. 442); but the articles may contain special provisions which render clauses of the latter description inoperative in such case (*Cookson v. Cookson*, 1837, 8 Sim. 529; *Yates v. Finn*, 1880, 13 Ch. D. 839, explained in *Daw v. Herring*, *ubi supra*).

A continuance of the business by the partners, or such of them habitually acted therein during the term, without any settlement liquidation of the partnership affairs, is presumed to be a continuance of the partnership (Part. Act, 1890, s. 27 (2); *Parsons v. Hayward*, 1862, 4 G., F. & J. 474).

4. DISSOLUTION AND WINDING-UP OF A PARTNERSHIP.

(1) *Causes of Dissolution*.—Disregarding, as not calling for special not mutual consent of all the partners, and such events, if any, as may made by the partnership articles special grounds for dissolution, events in which a partnership is or may be determined are the following

Expiration of Time.—Subject to any agreement between the partners a partnership which has been entered into for a fixed term or for a specified adventure or undertaking is dissolved by the expiration of that term, or the termination of the adventure or undertaking (Part. Act, 1890, s. 27, and *ante*, p. 460. If the business be continued after the expiration of term, see sec. 27, and *ante*, p. 479).

Notice.—Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention to do so to all the other partners (Part. Act, 1890, ss. 26 and 32 (c)).

The notice must be explicit, but may be prospective; if once given cannot be withdrawn without the consent of all the partners, and will be effectual though the partner to whom it is given be lunatic (*Robertson v. Lockie*, 1846, 15 Sim. 285; *Mellersh v. Keen*, 1859, 27 Beav. 236; *Jones v. Lloyd*, 1874, L. R. 18 Eq. 265), although in that case the dissolution cannot be carried out without recourse to the Court. Where the partnership is constituted by deed, a notice in writing, signed by the partner giving it, is sufficient (Part. Act, 1890, s. 26 (2); *sed quære*, if a written notice in such case is necessary).

The dissolution will date from the date mentioned in the notice or the date of dissolution, or, if no date is mentioned, from the date of communication of the notice (Part. Act, 1890, s. 32). If an action for dissolution of a partnership at will be brought without any previous notice, the writ is treated as notice of dissolution, and the dissolution will date from the service of the writ (*Unsworth v. Jordan*, 1896, W. N. (5); *Shepherd v. Allen*, 1864, 33 Beav. 377).

Death.—Subject to any agreement between the partners, every partnership is dissolved as between all the partners by the death of any partner (Part. Act, 1890, s. 33 (1)); and this is so whether the partnership be an undefined term or for a term of years which has not expired when such death occurs (*ibid.*, and *Crawford v. Hamilton*, 1818, 3 Madd. 251; *Down v. Collins*, 1848, 6 Hare, 418).

Bankruptcy.—The bankruptcy of a partner not only determines his power to bind his copartners (Part. Act, 1890, s. 38; and *ante*, p. 469), but also, subject to any agreement between the partners, dissolves the partnership as regards all the partners (*ibid.*, s. 33; *Fox v. Hanbury*, 1776, Co. 448). It is presumed that the date of dissolution in this case will be the date of the commencement of the bankruptcy (Bank. Act, 1883, s. 43, and Bank. Act, 1890, s. 20).

Illegality.—A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on, or for the members of the firm to carry it on in partnership (Part. Act, 1890, s. 34).

Charging Order on Partner's Share.—If any partner suffers his share of the partnership property to be charged under the Partnership Act, 1890 (s. 23, *ante*, p. 476), for his separate debt, the partnership may be dissolved at the option of the other partners (*ibid.* s. 33). It appears doubtful whether the other partners must be unanimous in exercising this option, or whether a separate option is given to each of them, so that any one of them can exercise it.

(2) *Dissolution by the Court.*—The Court may decree a dissolution of partnership in any of the following cases (Part. Act, 1890, s. 35):—

(a) When a partner is found lunatic by inquisition, or is shown to the satisfaction of the Court to be of permanently unsound mind.

The lunacy of a partner does not of itself dissolve the partnership, but it has long been recognised that the confirmed lunacy of an active partner is sufficient to induce the Court to order a dissolution (*Sayer v. Bennett*, 1784, 1 Cox, 107; *Jones v. Noy*, 1833, 2 Myl. & K. 125; *Leaf v. Coles*, 1851, 1 De G., M. & G. 171; *Anon.*, 1855, 2 Kay & J. 441; *Jones v. Lloyd*, 1874, L. R. 18 Eq. 265). The Act gives the Court power to decree a dissolution in the case of a dormant partner.

The action may be commenced either by the committee of a lunatic partner so found, by the next friend of one not so found, or by the sane partner (s. 35 a).

If necessary, an interim injunction may be granted against the lunatic partner, restraining him from interfering in the business (*J. v. S.*, [1894] 3 Ch. 72).

By the Lunacy Act, 1890, the judge in Lunacy (53 Vict. c. 5, s. 108) has power to dissolve a partnership when a partner becomes lunatic within the meaning of that Act (*ibid.* ss. 116 (4), 119, and 341).

(b) When a partner becomes in any way permanently incapable of performing his part of the partnership contract (see *Whitwell v. Arthur*, 1865, 35 Beav. 140). Unless the incapacity arises from unsoundness of mind, the action for dissolution must be brought by one of the other partners (s. 35 (b)).

(c) When a partner has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business (*Essel v. Hayward*, 1860, 30 Beav. 158; *Anon.*, 1855, 2 Kay & J. 441; and see *Pearce v. Foster*, 1886, 17 Q. B. D. 536). The Court will not grant a dissolution at the instance of the guilty partner (s. 35 (c)).

(d) When a partner wilfully or persistently commits a breach of the partnership agreement, or so conducts himself in matters relating to the partnership business that it is not reasonably practical for his copartners to carry on business in partnership with him (*Harrison v. Tennant*, 1856, 21 Beav. 482; *Smith v. Jeyes*, 1841, 4 Beav. 503; *Waters v. Taylor*, 1813, 2 Ves. & Bea. 299, and 13 R. R. 91).

It is difficult to state what degree of misconduct will be sufficient to induce the Court to order a dissolution under this clause: keeping erroneous accounts (*Cheeseman v. Price*, 1865, 35 Beav. 142), refusal to meet on matters of business (*De Berenger v. Hammel*, 1829, 4 Bythewood and Jarman, 4th ed., 287), and continued quarrelling (*Baxter v. West*, 1860, 1 Drew. & Sm. 173; *Watney v. Wells*, 1861, 30 Beav. 56; *Leary v. Shout*, 1864, 33 Beav. 582) have been held to justify a dissolution, but the Court will not interfere on account of mere squabbles and ill-temper (*Goodman v. Whitcomb*, 1820, 1 Jac. & W. 589, and 21 R. R. 244; *Wray v. Hutchenson*, 1833, 2 Myl. & K. 235).

The Court will not grant a dissolution at the instance of the partner who is to blame (Part. Act, 1890, s. 35 (*d*); *Harrison v. Tennant*, 1856, 21 Beav. 495; *Fairthorn v. Weston*, 1844, 3 Hare, 387; the *dictum contra* by Lord C. in *Atwood v. Maude*, 1868, L. R. 3 Ch. p. 373, cannot be relied upon).

(*e*) When the business of the partnership can only be carried on at a loss (*Jennings v. Baddeley*, 1856, 3 Kay. & J. 78; *Baring v. Dix*, 1 Cox, 213).

In an urgent case the Court may even order a sale and wind up affairs of the partnership on motion (*Bailey v. Ford*, 1843, 13 Sim. 495).

(*f*) Whenever in any case circumstances have arisen which, in opinion of the Court, render it just and equitable that the partnership be dissolved.

It may be that in some cases the marriage of a female partner may render a dissolution just and equitable, as having deprived her of independent personal action in matters of business.

The Act is silent as to the effect of the assignment by a partner of his share as a cause of dissolution, but probably it is now (see sec. 31) no more than a circumstance enabling the Court, if it thinks fit, to order a dissolution on the ground that it is just and equitable to do so.

Date of Dissolution.—Unless the partnership is at will (see *ante*, p. 4) or has been previously determined under a power contained in the articles (*Robertson v. Lockie*, 1846, 15 Sim. 285; *Bagshaw v. Parker*, 1847, 10 B. 532), the partnership, when dissolved by the Court, will be dissolved from the date of the judgment (*Besch v. Frolich*, 1842, 1 Ph. Ch. 172; *1 v. Tweddell*, 1881, 17 Ch. D. 529).

Rescission for Fraud.—When a person is induced by the fraudulent misrepresentation of others to become a partner with them, the Court will rescind the contract at his instance (*Adam v. Newbigging*, 1888, L. 13 App. Cas. 308).

Inasmuch as a person who has been so induced to become a partner is under the same liability to third parties in respect of the debts and obligations of the firm incurred before the partnership contract has been rescinded as he would have been under had the contract been valid and unimpeachable, he is entitled, on the rescission of the contract, to be indemnified against these liabilities. The extent of the indemnity is defined by sec. 41 of the Partnership Act, 1890. Under that section is, without prejudice to any other right, entitled

(*a*) to a lien on, or right of retention of, the surplus of the partner's assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of the share in the partnership, and for capital contributed by him; and

(*b*) to stand in the place of the creditors of the firm for any payment made by him in respect of the partnership liabilities; and

(*c*) to be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm.

The cases decided before the Act show that the person entitled to rescind had further rights, which appear to be preserved by the Act; for instance, in the case of fraud (*Derry v. Peek*, 1889, L. R. 14 App. Cas. 334) to recover damages from the persons guilty of the fraud (see *Newbigging v. Adam*, 1886, 34 Ch. D. p. 589); and in all cases within the section to a lien only for the principal moneys mentioned in clause (*a*) of sec. 41, but also interest thereon, and for his costs of action (*Mycock v. Beatson*, 1879, 13 D. 384); and in addition to his lien, to an order making the persons who received such monies personally liable to repay them, with interest (*Ada*

Newbigging, 1888, 13 App. Cas. 308; *Rawlins v. Wickham*, 1858, 1 Gif. 355, and 3 De G. & J. 304). It appears also that he is entitled to interest on all payments made by him in respect of the partnership liabilities, and liable for interest on all profits which he has received (*Rawlins v. Wickham*, *supra*).

(3) *Dissolution by an Arbitrator*.—If partners, by their articles of partnership or otherwise, agree to refer all matters in difference to an arbitrator, and a dispute arises involving the question whether the partnership has been or ought to be dissolved, the arbitrator has power to dissolve the partnership (*Vawdrey v. Simpson*, [1896] 1 Ch. 166; *Belfield v. Bourne*, [1894] 1 Ch. 521). In such case the Court may, in its discretion, stay an action for dissolution, and send the question to arbitration (*ibid.*), and appoint a receiver pending the arbitration (*Pini v. Roncoroni*, [1892] 1 Ch. 633), or may refuse to stay the action (*Barnes v. Youngs*, [1898] 1 Ch. 414, a case of expulsion; *Joplin v. Postlethwaite*, 1889, 61 L. T. N. S. 629; *Turnell v. Sanderson*, 1891, 64 L. T. N. S. 654).

(4) *Dissolution under the Companies Acts*.—A partnership which consists of more than seven members may be wound up by order of the Court, under the Companies Acts, 1862 to 1890, as an unregistered company (see Act, 1862, s. 199): (1) Whenever it is dissolved or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs; (2) whenever it is unable to pay its debts; and (3) whenever the Court is of opinion that it is just and equitable that it should be wound up. For information as to this, the reader is referred to Buckley on *The Companies Acts*; Lindley on *The Law of Companies*; Palmer's *Company Precedents*, part ii.; and other writers on company law.

(5) *Retirement*.—In the absence of any special agreement, a partner has no right to retire from a firm without the consent of all the members of the firm, except by dissolving the firm, when he is in a position to do so (as to this, see *ante*, p. 480).

(6) *Expulsion*.—No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners (Part. Act, 1890, s. 25, and *ante*, p. 473).

A partner who has retired or been expelled from a firm may, in the absence of any agreement to the contrary, set up and carry on a business in competition with, and in the immediate neighbourhood of, his former firm, and advertise such business and deal with the customers of his former firm; but if his former partners are entitled, by purchase from, or under an agreement with, him, to the goodwill of the partnership business, he may not represent himself as continuing or succeeding to that business, nor may he solicit the customers of the firm (*Churton v. Douglas*, 1859, John. 174; *Labouchere v. Dawson*, 1872, L. R. 13 Eq. 322; *Dawson v. Beeson*, 1882, 22 Ch. D. 504; *Trego v. Hunt*, [1896] App. Cas. 7; *Jennings v. Jennings*, [1898] 1 Ch. 378; and *ante*, p. 479; article on GOODWILL; Lindley on *Partnership*, pp. 438 *et seq.*).

(7) *Consequences of Dissolution*.—The effect of a dissolution, whether general or partial, on the liability of a partner for the future (*ante*, p. 467) or past (*ante*, p. 468) acts of his copartners, the necessity for giving notice of dissolution (*ante*, p. 480), the extent to which a partner's authority to bind the firm continues (*ante*, p. 468), the continuance of the obligation to observe good faith (*ante*, p. 473), the proportions in which profit and loss (*ante*, p. 475) are to be shared and borne between them, their right to contribution and indemnity (*ante*, p. 477), and in some cases to compensation for services after dissolution (*ante*, p. 472), and the rules for ascertaining what

is and what is not partnership property (*ante*, p. 474), have already discussed, and must be borne in mind when settling the partner accounts and finally winding up the affairs of the firm. The following topics remain for consideration:—

(a) *Return of Premiums*.—It frequently happens, when one person admitted into partnership with another already established in business, the incoming partner pays the other a sum of money, or premium, for own private benefit.

If the new partner has been induced to enter into the partnership pay the premium by a fraud or misrepresentation, he may rescind contract and recover the whole premium (Part. Act, 1890, s. 41, and p. 482), or abide by the contract and, in the case of fraud, claim compensation for the loss thereby occasioned. Even in the absence of fraud the partner who paid the premium may in some cases claim a return of a portion of the premium when the partnership has been prematurely dissolved.

In the case of a partnership at will, the partners must be taken to have run the risk of the partnership being determined at any time (*Tassall v. Groote*, 1800, 2 Bos. & Pul. 134), and, apart from fraud either in formation or dissolution of the partnership (*Featherstonhaugh v. Turner*, 1858, 25 Beav. 382; *Burdon v. Barkus*, 1862, 4 De G., F. & J. at p. 52) part of the premium will be returned.

If a partnership for a fixed term is dissolved before the expiration of term otherwise than by the death of a partner—a contingency which persons entering into partnership know may determine it (*Whincup Hughes*, 1871, L. R. 6 C. P. 78; *Ferns v. Carr*, 1885, 28 Ch. D. 409; and *Mackenna v. Parkes*, 1866, 36 L. J. Ch. N. S. 366)—the Court, or, if question of dissolution be submitted to arbitration, the arbitrator (*Belmont v. Bourne*, [1894] 1 Ch. 521), may, except in certain cases hereafter mentioned, in its discretion order the repayment of the premium, or of so much part thereof as it thinks just (Part. Act, 1890, s. 40; if the partnership determined by the bankruptcy of a partner, see *Hamil v. Stokes*, 1881, 18 Dan. 20, and 18 R. R. 690; *Akhurst v. Jackson*, 1818, 1 Swans. 479; *Freeland v. Stansfeld*, 1854, 2 Sm. & G. 479).

In determining what is just, the Court is to take into consideration the terms of the partnership contract and the length of time the partnership has continued (s. 40; before this Act the Court exercised a wide discretion, see *Lyon v. Tweddell*, 1881, 17 Ch. D. 529). The rule generally adopted is to order the return of so much of the premium as bears the same proportion to the whole as the actual bears to the agreed duration of the partnership (*Atwood v. Maude*, 1868, L. R. 3 Ch. 369; *Wilson v. Johnstone*, 1873, L. R. 16 Eq. 606; *Pease v. Hewitt*, 1862, 31 Beav. 22; *Astle v. Wright*, 1856, 23 Beav. 77; but compare *Bullock v. Crockett*, 1862, 31 Beav. 507; *Freeland v. Stansfeld*, and *Hamil v. Stokes*, *ubi supra*). The Court of Appeal will not, as a rule, interfere with the manner in which the Court of first instance has exercised this discretion (*Lyon v. Tweddell*, 1881, 17 Ch. D. 529).

The excepted cases in which the Court has no power to order a return of the premium to be returned are (Part. Act, 1890, s. 40), first, where the dissolution is in the judgment of the Court wholly or chiefly on the ground of the misconduct of the partner who paid the premium (*Airey v. Borlase*, 1861, 29 Beav. 620; *Atwood v. Maude*, and *Wilson v. Johnstone*, *ubi supra*). If such partner has not paid the premium which he has agreed to pay

will be ordered to pay it (*Bluck v. Capstick*, 1879, 12 Ch. D. 863). Secondly, where the partnership has been dissolved by an agreement containing no provision for the return of any part of the premium (*Lec v. Page*, 1861, 30 L. J. Ch. N. S. 857). If no definite agreement has been come to, and the partners have merely consented to dissolve, it is presumed that the question of the return of the premium will remain open (*Bury v. Allen*, 1844, 1 Col. C. C. 589; *Astle v. Wright*, 1856, 23 Beav. 77; *Wilson v. Johnstone*, 1873, L. R. 16 Eq. 606). The decision of the question whether any part of the premium is returnable or not should be obtained at the hearing of the action (*Edmonds v. Robinson*, 1885, 29 Ch. D. 170).

(b) *Conduct of the Winding up.*—The partners are the proper persons to get in the assets and wind up the affairs of the partnership, and their power to bind the firm continues for this purpose notwithstanding a dissolution (see Part. Act, 1890, s. 38, *ante*, p. 461). If, after a dissolution, they cannot agree as to the conduct of the winding up, the Court will almost as a matter of course appoint a receiver, and, if necessary, a manager of the partnership business (*Pini v. Roncoroni*, [1892] 1 Ch. 633; *Taylor v. Neate*, 1888, 39 Ch. D. 538; *Goodman v. Whitcomb*, 1820, 1 Jac. & W. 589, and 21 R. R. 244), and will restrain a partner by injunction from doing any act which will impede the winding up of the concern, *e.g.* injuring the value of (*Turner v. Major*, 1862, 3 Gif. 442; *Marshall v. Watson*, 25 Beav. 501; see, too, *Hermann Loog v. Bean*, 1884, 26 Ch. D. 306) or misapplying the assets of the firm (*Hood v. Aston*, 1826, 1 Russ. 412, and 25 R. R. 93; *Garrett v. Moore*, 1891, Seton, 5th ed., p. 591), or withholding the partnership books (*Greatrex v. Greatrex*, 1847, 1 De G. & Sm. 692).

Where a partnership has been dissolved by the death or bankruptcy of one of the partners, the surviving (*Collins v. Young*, 1853, 1 Macq. H. L. Cas. 385) or solvent (*Ex parte Owen*, 1884, 13 Q. B. D. 113) partners are entitled in a proper case to an injunction to restrain the executors or the trustee in bankruptcy (*Allen v. Kilbre*, 1819, 4 Madd. 464) from interfering with them. This right to wind up the affairs of the partnership is personal to the partners, and springs from the confidence originally placed in them by the deceased or bankrupt partner (*Fraser v. Kershaw*, 1856, 2 Kay & J. 496). Nevertheless, if special grounds be shown, the Court will, at the instance of the executors of a deceased or the trustee of a bankrupt partner, interfere by injunction (*Hartz v. Schrader*, 1803, 8 Ves. Jun. 317, and 7 R. R. 55; *Elliot v. Brown*, 1819, 3 Swans. 489, note), or by the appointment of a receiver (*Madgwick v. Wimble*, 1843, 6 Beav. 495), to protect the partnership assets and insure the proper conduct of the winding up (Part. Act, 1890, s. 39). The solvent partner may himself be appointed receiver and manager (*Collins v. Barker*, [1893] 1 Ch. 578).

(c) *Application of Partnership Property.*—On a dissolution, every partner is entitled, as against the other partners, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets, after such payment, applied in payment of what may be due to the partners respectively, after deducting what may be due to the firm from them as partners (see *West v. Skip*, 1749, 1 Ves. 249); but not in any other capacity (see *Ryall v. Rowles*, 1749, 1 Ves. 348; *Skip v. Harwood*, 1747, 2 Swans. 586, note); and for that purpose any partner or his representatives may apply to the Court to wind up the business and affairs of the firm (Part. Act, 1890, s. 39).

This right is available against the executors of a deceased, or the trustee of a bankrupt, partner (*Croft v. Pike*, 1733, 3 P. Wms. 180) and the assignee of

a partner's share (*Cavander v. Bulteel*, 1873, L. R. 9 Ch. 79), but not against a purchaser from a partner of specific chattels of the firm (*Langmead's Trusts*, 1855, 7 De G., M. & G. 353). It is in the nature of an equitable lien, and exists during the partnership, though it does not become absolute until a dissolution. It then only attaches to what was partnership property at the time of the dissolution (*Payne v. Hornby*, 1858, 25 Beav. 280; see *Nerot v. Burnand*, 1847, 4 Russ. 247; 2 Bli. N. S. 215; and 28 R. R. *Ex parte Morley*, 1873, L. R. 8 Ch. 1026). Unless specially retained (*Holderness v. Shackels*, 1828, 8 Barn. & Cress. 612, and 32 R. R. 496) it is lost by the conversion of partnership property into the separate property of a partner (*Lingen v. Simpson*, 1824, 1 Sim. & St. 600, and 24 R. R. 2 *Langmead's Trusts*, 1855, 7 De G., M. & G. 353; *Holroyd v. Griffiths*, 1833 Drew. 428).

(d) *Right to a Sale*.—On a dissolution, in the absence of special agreement the right of each partner and of his representatives (*Hale v. Hale*, 1844 Beav. 369; *Wilson v. Greenwood*, 1818, 1 Swans. 471, and 18 R. R. 11) but not necessarily of everyone entitled to a share in the profits (*Walsh v. Hirsch*, 1884, 27 Ch. D. 460), is to have the partnership property converted into money by a sale (*Featherstonhaugh v. Fenwick*, 1810, 17 Ves. Jun. 3 and 11 R. R. 77; *Wild v. Milne*, 1859, 26 Beav. 504).

To avoid the loss consequent on a sale, several devices are had recourse to. The most usual is for the partners to agree that the share of an outgoing or deceased partner shall be taken at the value appearing on the last general account. If, in such a case, the accounts be regularly taken (*Ex parte Barber*, 1870, L. R. 5 Ch. 687; *Coventry v. Barclay*, 1864, 3 De G. & S. 320), or if, though the accounts be not taken in strict accordance with the articles, the agreement can be carried out in its spirit, the partners will be bound thereby (*Hunter v. Dowling*, [1893] 3 Ch. 212; *Laves v. Larner*, 1878, 9 Ch. D. 98; *Simmons v. Leonard*, 1844, 3 Hare, 581; *Petty Janeson*, 1819, 6 Madd. 146, and 22 R. R. 252; and where the agreement is for a valuation, see *Dinham v. Bradford*, 1870, L. R. 5 Ch. 519; cp. *Collins v. Collins*, 1858, 26 Beav. 306; *Vickers v. Vickers*, 1867, L. R. 4 Eq. 529).

But whatever agreement may be entered into to avoid a sale, if it cannot be carried out, or if it does not extend to the event which in fact arises, the Court will order a sale (*Cook v. Collingridge*, 1822, Jac. 607, and 23 R. R. 155; *Taylor v. Neate*, 1888, 39 Ch. D. 538; *Downs v. Collier*, 1848, 6 Hare, 418; *Kershaw v. Matthews*, 1826, 2 Russ. 62, and 26 R. R. 13), though in one case it claimed a discretion in the matter, and refused to do so (*Syers v. Syers*, 1876, 1 App. Cas. 174).

The goodwill of the partnership business, in the absence of an agreement to the contrary, forms part of the assets of the firm, and, if saleable, a partner has the right to insist upon its sale (*Pawsey v. Armstrong*, 1818 Ch. D. 698; *Bradbury v. Dickens*, 1859, 27 Beav. 53; see as to goodwill of commission agent, *Stewart v. Gladstone*, 1879, 10 Ch. D. 626; of tobacco broker, *Davies v. Hodgson*, 1858, 25 Beav. 177; of solicitor, *Austen v. Bell*, 1858, 2 De G. & J. 626; *Arundell v. Bell*, 1883, 52 L. J. Ch. 537). If a partner improperly obtains the benefit of the goodwill, he can be compelled to account for its saleable value (*Smith v. Everett*, 1860, 27 Beav. 44; *Mellersh v. Keen*, 1860, 28 Beav. 453; *Johnson v. Helleley*, 1864, 2 De G. & S. 446). In considering the value of the goodwill, the rights of late partners to carry on business in competition with the purchaser of their business must be borne in mind (see *ante*, p. 483). In a sale under the Court these rights are usually referred to in the particulars of sale (*Trego v. Hunt*, [1896] App. Cas. p. 18).

If a partner holds a valuable appointment (*Smith v. Mules*, 1851, 9 Hare, 572) or contract (*Ambler v. Bolton*, 1872, L. R. 14 Eq. 427) which is not saleable, but the profits of which are to be accounted for by him to the firm, he will be debited with its value. But if the partnership be formed for carrying out a contract which is unfinished when the partnership is dissolved, the Court may leave the partners to complete the contract, and postpone the ultimate account until its completion (*McClean v. Kenward*, 1874, L. R. 9 Ch. 336).

(e) *Accounts on Dissolution*.—On a dissolution proper, accounts must be taken of the partnership dealings and transactions, with a view to showing the position of the firm to outside creditors, and of the partners towards one another.

An account may be had by one partner or his executors or administrators against his copartners or their executors or administrators, and by the trustees of a bankrupt partner against the solvent partner or his executors or administrators (Lindley on *Partnership*, 6th ed., p. 494). The assignee of a partner's share is also entitled to an account as from the date of dissolution (Part. Act, 1890, s. 31 (2)).

In taking the account attention must be paid not only to the terms of the partnership articles, but also to the manner in which they have been acted on by the partners (Part. Act, 1890, s. 19; *ante*, p. 472; *Coventry v. Barclay*, 1864, 3 De G., J. & S. 320; *Ex parte Barber*, 1870, L. R. 5 Ch. 687). But it must not be forgotten that where there is an express agreement or a recognised practice amongst the partners with reference to the taking of accounts, it not unfrequently happens that this is only applicable to the accounts to be taken during the continuance of the partnership, and not to the accounts to be taken on the final dissolution of the firm, or on the retirement of one of the partners (*Steuart v. Gladstone*, 1878, 10 Ch. D. 626; *Watney v. Wells*, 1867, L. R. 2 Ch. 250; *Wood v. Scoles*, 1866, L. R. 1 Ch. 369; *Blisset v. Daniel*, 1853, 10 Hare, p. 517; *Wade v. Jenkins*, 1860, 2 Gif. 509).

The account will begin from the commencement of the partnership unless an account has been settled between the partners, in which case the last settled account will be the point of departure (see article ACCOUNT SETTLED). In taking accounts under an ordinary judgment, settled accounts are never disturbed unless specially directed so to be (see *Holgate v. Shutt*, 1884, 28 Ch. D. 111; *Newen v. Wetten*, 1862, 31 Beav. 315). If the partners have had mutual dealings preparatory to the commencement of their partnership, these dealings must be included in the general account (*Cruikshank v. M'Vicar*, 1844, 8 Beav. 116).

The account will be taken down to the date of dissolution; but if there is a general dissolution and winding up, it will be kept open to include all transactions incidental to the winding up.

In certain cases, now to be considered, an outgoing or deceased partner is entitled to an account of profits made since his retirement or death.

If a partner agrees that on his death or retirement his capital shall be left as a loan in the business at interest, he or his estate will be entitled to his capital and interest, and nothing more. In case of bankruptcy, see *Collins v. Barker*, [1893] 1 Ch. 578.

If the executors or trustees of a deceased partner lend his capital to his former partners, who are not executors or trustees, at interest, the obligation of the former partners, whether the money was lent to them properly or in breach of trust, and in the latter case whether they had or had not notice of such breach, is limited to the repayment of the loan, with the

interest agreed upon (*Chambers v. Howell*, 1847, 11 Beav. 6; *Parker v. Bloxa* 1855, 20 Beav. 295; *Stroud v. Gwyer*, 1860, 22 Beav. 130; compare *Flockt v. Bunning*, 1864, L. R. 8 Ch. 323, note).

If the surviving or continuing partners have by the partnership agreement an option to purchase the interest of the deceased or outgoing partner and exercise the option and comply with the terms thereof in all material respects, their liability will be that imposed upon them by the agreement and they will not be liable to account for subsequent profits, even though one or more of the partners is an executor or trustee of the deceased partner (Part. Act, 1890, s. 42 (2); *Vyse v. Foster*, 1874, L. R. 7 H. 318).

If, after the death or retirement of a partner, the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled, at the option (see *Vyse v. Foster*, 1874, L. R. 7 H. L. at p. 336) of himself or his representatives, either to such share (if any, see *Wedderburn v. Wedderburn*, 1855, 22 Beav. 84; *Simpson v. Chapman*, 1853, 4 De G., M. & G. 154) of the profits made since the dissolution as the Court may find to be attributable to the use of his share in the partnership assets (see *Willett v. Blandford*, 1841, 1 Hare, p. 27; *Yates v. Finn*, 1880, 13 Ch. D. 843), or to interest at the rate of 5 per cent. per annum on the amount of his share of the partnership assets (Part. Act, 1890, s. 42 (1); and before the Act, see in case of bankruptcy, *Crawshaw v. Collins*, 1862, 2 Russ. 325, and 26 R. R. 83; of death, *Yates v. Finn* 1880, 13 Ch. D. 383; *Brown v. De Tastet*, 1821, Jac. 284, and 23 R. R. 5; of lunacy, *Mellersh v. Keen*, 1859, 27 Beav. 236; of dissolution, *Parsons Hayward*, 1862, 4 De G., F. & J. 474; *Turner v. Major*, 1862, 3 Gif. 44; *Featherstonhaugh v. Fenwick*, 1810, 17 Ves. Jun. 298, and 11 R. R. 77).

The outgoing partner or his representatives have the like option if the surviving or continuing partners, having by the partnership agreement an option to purchase the interest of the deceased or outgoing partner, assume to exercise such option, but do not in all material respects comply with the terms thereof (Part. Act, 1890, s. 42 (2); *Willett v. Blandford*, 1841, 1 Hare, 253).

Apart from the liability under sec. 42 of the Partnership Act, 1890, a trustee or executor enters into partnership with the former partners or his testator, or with other persons, and wrongfully employs the testator's estate in the business as part of its capital, all the partners in such business, if they have notice (*Travis v. Milne*, 1851, 9 Hare, 141) of the breach of trust (but not otherwise, see Part. Act, 1890, s. 13; *ante*, p. 465), will be jointly and severally liable to account for the profits attributable to the use of such estate to the persons interested therein, or, at the option of such persons, to pay them interest thereon at the rate of 5 per cent. per annum (*Flockton v. Bunning*, 1864, L. R. 8 Ch. 323, note; *Townend v. Townend*, 1859, 1 Gif. 201, where money was retained in the business beyond the authorised time; *Heathcote v. Hulme*, 1819, 1 Jac. & W. 122, and 20 R. R. 248; *Vyse v. Foster*, 1874, L. R. 7 H. L. p. 336; see too *Docker v. Somes*, 1833, 2 Myl. & K. 655). If in such a case the other partners have no notice that such employment is a breach of trust, the trustee or executor in the firm cannot be charged with a greater share of such profits than he himself has received (*Vyse v. Foster*, 1874, L. R. 8 Ch. 309, and L. R. 7 H. L. 334; *Macdonald v. Richardson*, 1857, 1 Gif. 81; *Jones v. Fox*, 1852, 15 Beav. p. 395). If there be another trustee or executor, with

is not in the firm, such trustee or executor will be under no liability to account for any share of such profits (*Vyse v. Foster*, *ubi supra*).

In these cases if a share of profits is claimed, and profits have been made (*In re Aldridge*, [1894] 2 Ch. 97), the continuing or surviving partners, unless they be executors or trustees (*Burden v. Burden*, 1813, 1 Ves. & Bea. 170, and 12 R. R. 210; *Stocken v. Dawson*, 1843, 6 Beav. 371), are entitled to some compensation for their trouble in managing the business (*Brown v. De Tastet*, 1821, Jac. 284, and 23 R. R. 59; *Featherstonhaugh v. Turner*, 1858, 25 Beav. 382; *Mellersh v. Keen*, 1859, 27 Beav. 242).

If infants be interested in the estate, the Court may direct an inquiry to ascertain whether it will be more beneficial to them to claim a share of profits or interest (*Heathcote v. Hulme*, 1819, 1 Jac. & W. 122, and 20 R. R. 248, and *Burden v. Burden*, there cited).

When interest is claimed, a partner who is also a trustee may in some cases be charged *quâ* trustee with compound interest (see *Jones v. Foxall*, 1852, 15 Beav. 388; *Williams v. Powell*, *ibid.* 461; per Lord Selborne in *Vyse v. Foster*, 1874, L. R. 7 H. L. 346).

The proper persons to bring an action to recover what is due from the surviving partners to the estate of a deceased partner are his executors; but if they stand in such a position with regard to the surviving partners that they cannot fairly prosecute the rights of the persons interested in such estate, the persons so interested may sue (*Law v. Law*, 1845, Col. C. C. 41, and 11 Jur. 463; *Travis v. Milne*, 1851, 9 Hare, 141; *Stainton v. The Carron Co.*, 1853, 18 Beav. 146; *Benningfield v. Baxter*, 1887, L. R. 12 App. Cas. pp. 178, 179).

If the surviving partners and the executors are different persons, and they have come to an account respecting the partnership affairs, and have settled such account as final, or if the executors have sold the deceased partner's share to the surviving partner, such account or sale will be binding between the surviving partners and the persons interested in the estate of the deceased partner, and cannot be impeached except on the ground of fraud (*Davies v. Davies*, 1837, 2 Keen, 534; *Chambers v. Howell*, 1847, 11 Beav. 46; *Smith v. Everett*, 1859, 27 Beav. 446; Trustee Act, 1893, s. 21). But if the executors are themselves the surviving partners, or some of them, it becomes exceedingly difficult to come to any arrangement which will be binding on the persons interested in the estate of the deceased partner; arrangements come to under such circumstances have been set aside after many years (*Wedderburn v. Wedderburn*, 1836, 2 Keen, 722, and 4 Myl. & Cr. 41; *Cook v. Collingridge*, 1822, Jac. 607, and 23 R. R. 155 and 767; and 27 Beav. 456; *Stocken v. Dawson*, 1845, 6 Beav. 371; *Benningfield v. Baxter*, 1887, L. R. 12 App. Cas. 167).

Subject to any agreement between the partners, the amount due from the surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share, is a debt accruing at the date of the dissolution or death (Part. Act, 1880, s. 43), and the Statutes of Limitations will apply accordingly (*Knox v. Gye*, 1871, L. R. 5 H. L. 656; *Noyes v. Crawley*, 1878, 10 Ch. D. 31; *Betjemann v. Betjemann*, [1895] 2 Ch. 474).

(f) *Distribution of Assets on Final Settlement of Accounts*.—By the 44th sec. of the Partnership Act, 1890, which is in accordance with the previous law (see *Binney v. Mutrie*, 1886, 12 App. Cas. 160; *Crawshay v. Collins*, 1826, 2 Russ. 347, and 26 R. R. 83), it is enacted that

In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed—

(a) losses, including losses or deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits (see *ante*, p. 475);

(b) the assets of the firm, including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order—

(1) in paying the debts and liabilities of the firm to persons who are creditors of the firm;

(2) in paying to each partner rateably what is due from the firm to him for advances, as distinguished from capital;

(3) in paying to each partner rateably what is due from the firm to him in respect of capital;

(4) the ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible (*ante*, p. 475).

When the partnership is being wound up by the Court, the costs of the action are payable out of the assets after payment thereof of what is due from the firm to the partners in respect of advances or capital, and if the assets are insufficient, the costs must be borne by the partners in the proportion in which profits are divisible (*Ross v. White*, [1894] 3 Ch. 326; *Potter v. Jackson*, 1880, 13 Ch. D. 845; *Hamer v. Giles*, 1879, 11 Ch. D. 942; *Austin v. Jackson*, 1878, *ibid.* 942, note). Before any partner can take his costs out of the assets, he must make good what is due to the assets ([1894] 3 Ch. 336).

These rules, so far as they relate to the rights of the partners *inter se*, are only applicable subject to any agreement between the partners; and they agree that any surplus after payment of debts shall be divided between the partners in proportion to their interests therein, or to their capital, that effect will be given to such agreement; and if such surplus is insufficient to repay to each partner what is due to him from the firm, those who bring in most capital will lose most (*Wood v. Scoles*, 1866, L. R. 1 Ch. 369; see too *Eclipse Gold Mining Co.*, 1874, L. R. 17 Eq. 490).

It must not be forgotten that the mode in which profits are to be ascertained and divided during the partnership may differ from that in which they are to be ascertained and divided on a final settlement of the accounts (*Wood v. Scoles*, *supra*; *Bridgewater Navigation Co.*, 1888, 39 Ch. D. 1, and *sub nom. Birch v. Cropper*, 1889, L. R. 14 App. Cas. 525; see further, [1891] 2 Ch. 317).

5. ADMINISTRATION OF THE ESTATE OF A DECEASED PARTNER.

The surviving partners are creditors against the estate of a deceased partner for what may be due to them from the deceased partner on a settlement of the partnership accounts (Part. Act, 1890, s. 43). They may sue the legal personal representatives of the deceased partner either for a judgment for a partnership account, and for payment of what is due on that account, and, if assets are not admitted, for the administration of his estate (3 Seton, *Judgments and Orders*, 5th ed., 1812), or, if creditors, for a common administration judgment.

In an administration action brought by a separate creditor of a deceased partner, or by a person interested in his estate, against his legal personal representatives, an inquiry may be directed as to what is due from the estate of the deceased in respect of his share in the partnership (*Macdonald v. Richardson*, 1858, 1 Giff. p. 90), but in such an action a judgment can be given against the surviving partners for payment of what

is due on that account; in the absence of special circumstances, the only persons who can take proceedings against the surviving partners to obtain such payment are the legal personal representatives of the deceased partner (see *ante*, p. 489). If the surviving partners seek to obtain, in such an administration action, payment of a balance due to them on the partnership accounts, these accounts must be taken (*Paynter v. Houston*, 1817, 3 Mer. 127; *Wolley v. Gordon*, 1829, Taml. 11, and 31 R. R. 58).

The creditors of the firm of which the deceased partner was a member may also bring an action for the administration of his estate, but they are not entitled to be paid out of his separate estate until all his separate creditors have been satisfied (for the form of judgment in such cases, see *Hills v. M'Rae*, 1851, 9 Hare, 297; 3 Seton, 5th ed., p. 1819; and as to their rights against the surviving partners, see *ante*, p. 470).

For the cases in which creditors can claim against the estate of a deceased partner for debts incurred after his death, see *ante*, p. 466.

The rules in bankruptcy—that in the first instance the debts of the firm are to be paid out of the assets of the firm, and the separate debts of each partner out of his separate estate (Bank. Act, 1883, s. 40; *Ridgway v. Clare*, 1854, 19 Beav. 111; *Lodge v. Pritchard*, 1863, 1 De G., J. & S. 610), and that a partner may not prove against the separate estate of his co-partner whilst the joint debts are unpaid (*Lacey v. Hill*, 1872, L. R. 8 Ch. 441; see too *Ex parte Head*, [1894] 1 Q. B. 638)—have been adopted in administering the insolvent estate of a deceased partner (Jud. Act, 1875, s. 10).

For the position of persons, who have advanced money to anyone engaged in business on a contract that the lender shall receive a rate of interest varying with the profits or a share of the profits of the business, or who have sold the goodwill of a business for a portion of the profits, in the event of the borrower, or purchaser of the goodwill, dying insolvent, see *ante*, p. 455.

For further information on this subject, and on the administration of partnership property and the separate property of the partners in bankruptcy, see article on BANKRUPTCY; Lindley on *Partnership*, 378 *et seq.*; Pollock's *Digest of the Law of Partnership*, p. 142; and the standard text-books on Bankruptcy).

[*Authorities.*—Generally, Lindley on *Partnership*, 6th ed.; Pollock's *Digest of the Law of Partnership*, 6th ed. For precedents of articles of partnership, see *Conveyancing Precedents*, by Bythewood and Jarman, 4th ed., by Robbins, vol. iv.; Davidson, 3rd ed., vol. v. part ii.; Kay and Elphinstone, 5th ed., vol. ii. For forms of orders, see Seton. For the practice in the High Court, see Daniell's *Chancery Practice*, 6th ed.; *The Annual Practice*; and in the County Court, *The Annual County Court Practice*.]

Part-Owners.—See JOINT-TENANCY; PARTNERSHIP.

Part Payment.—See LIMITATIONS (STATUTES OF). Part payment of principal or payment of a debt takes the debt out of the operation of the Limitation Act, 1623. See vol. vii. at p. 476.

Part Performance.—See LIMITATIONS (STATUTES OF); FRAUDS, STATUTES OF.

Partridge.—See GAME LAWS.

Party.—It is provided by sec. 100 of the Judicature Act, 1873, that in the construction of the Act, unless there is anything in the subject context repugnant thereto, the word “party” shall include every person served with notice of, or attending any proceeding, although not named in the record. A person who is served with a writ is thereby made a party to the proceeding, even if he does not appear (per Lindley, L.J., *In Evans*, [1893] 1 Ch. 252, 264); and a person who is served with notice of the judgment in an administration action, and who has obtained leave to attend the proceedings, is a party to the action, and may apply for leave to prosecute the same, upon the death of the plaintiff (*Burstall v. Fearon*, 1881 31 W. R. 581). So, a person who has been served by a defendant with third party notice, and who has appeared and been given leave to defend the action, is a party within the meaning of the Judicature Acts and Rules (*MacAllister v. Rochester*, 1880, 5 C. P. D. 194); but the next friend of an infant is not (*In re Corsellis*, 1883, 52 L. J. Ch. 399; *Dyke v. Stephens*, 1883 30 Ch. D. 189), though Order 31 now extends to infants and their next friends and guardians *ad litem* (Order 31, r. 29). As used in Order 31, r. 2, the word party may mean two or more plaintiffs or defendants collectively (*Joyce v. Beall*, [1891] 1 Q. B. 459); and where there are any rights to be adjusted as between co-plaintiffs or co-defendants in an action,—but not otherwise,—each co-plaintiff or co-defendant is a party, who is entitled to make an application against the other co-plaintiff or co-defendant under Order 31, r. 12, or Order 50, r. 3 (*Shaw v. Smith*, 1886, 18 Q. B. D. 19; *Brown v. Watkins*, 1885, 16 Q. B. D. 125). In sec. 40 of the Chance Procedure Act, 1852 (15 & 16 Vict. c. 86), the word “party” was held to have been used in the sense of person (*In re Quartz Hill, etc., Co.*, 1881 21 Ch. D. 642); but when used in reference to any proceedings, it *prima facie* means a party to the proceedings (*Smith v. Darlow*, 1884, 26 C. D. 605).

The licensing justices, when sitting for the purpose of considering the renewal of licences, do not constitute a Court of summary jurisdiction within the meaning of the Summary Jurisdiction Act, 1879, and a person who appears before them as an objector to the renewal of a licence is not a party to the proceedings, and cannot be ordered to pay costs. Nor have the Quarter Sessions, upon an appeal from a decision of the licensing justices, power to award costs either against any justice who opposes the appeal, or any other person objecting to the renewal of the licence (*Boulton v. Kent JJ.*, [1897] App. Cas. 536; *R. v. Staffordshire JJ.*, 1898, 42 Sol. 540; overruling *R. v. London JJ.*, [1895] 1 Q. B. 616).

“The party by law enabled to declare such trust” in sec. 7 of the Statute of Frauds means the person who is entitled to the beneficial interest in the property settled, whether he has the legal estate or not (*Dye v. Dye*, 1884, 13 Q. B. D. 147; *Kronheim v. Johnson*, 1877, 7 Ch. D. 60).

See also PARTIES.

Party Wall (*mur mitoyen*).—This term appears to have at least four meanings apart from special statutory definitions (*Watson v. Grosvenor*, 1880, 14 Ch. D. 192):—

(1) A wall of which the adjoining owners are tenants in common (*Wishire v. Sidford*, 1827, 1 M. & Ry. 404; 31 R. R. 329; *Cubitt v. Porter*, 1828

Barn. & Cress. 257 ; 32 R. R. 374). In the case of a wall of this kind, the tenants in common are entitled to have a partition of the wall so as to hold the parts separately (*Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508). Until this is done, either tenant is at common law free to use the wall for any purpose not having the effect of ousting the other (*Murray v. Hall*, 1849, 7 C. B. 441). If he exceeds his rights, the other tenant can sue in trespass or remove the excessive structure (*Cubitt v. Porter*, *ubi supra* ; *Stedman v. Smith*, 1857, 8 El. & Bl. 1).

(2) A wall divided longitudinally into two strips, one belonging to each of the adjoining owners. Each owner can at common law use only his own part of the wall (*Matts v. Hawkins*, 1813, 5 Taun. 20 ; 14 R. R. 695).

(3) A wall wholly belonging to one owner, but subject to an easement or right in others to have it maintained as a dividing wall between the two tenements. The owner of the dominant tenement is at common law entitled to put on such a wall any weight he likes, as long as he does not endanger the stability of the wall (*Sheffield Improved Industrial Society v. Jarvis*, 1871, W. N. 208).

(4) A wall divided longitudinally into two halves separately owned, each half subject to a cross easement in favour of the owner of the other half. Each owner, in such a case, has at common law the right to put any amount of weight on the wall which will not injure its stability.

It is, of course, a question of fact whether a wall is a party wall in any one of these senses ; and whether it is so wholly or only to a limited height or length or breadth (*Weston v. Arnold*, 1873, L. R. 8 Ch. 1084 ; *Knight v. Pursell*, 1879, 11 Ch. D. 412). There is a presumption, in the absence of other evidence, that there is a tenancy in common in such a wall, and the right and mode of use by adjoining owners depends on the same considerations, and on the ordinary rules of law as to care in building operations affecting such walls.

In London the common law rules were swept away by an Act of 1772 (12 Geo. III. c. 73), known as the Party Wall Act. That Act was superseded by the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), and the present provisions on the subject are contained in Part VIII. of the London Building Act, 1894 (57 & 58 Vict. c. 213).

These statutory provisions wholly supersede, as to London, the common law with reference to building on party walls (*Standard Bank of British South Africa v. Stokes*, 1878, 9 Ch. D. 68 ; *Pratt v. Hillman*, 1825, 4 Barn. & Cress. 269).

Sec. 5 (16) defines party wall as : “(1) a wall forming part of a building, and used, or constructed to be used, for separation of adjoining buildings belonging to different owners, or occupied, or constructed or adapted to be occupied, by different persons ; or (2) a wall forming part of a building, and standing to a greater extent than the projections of the footings on lands of different owners. The Act also contains definitions of party fence walls, party arches, and party structures (s. 5 (17) (18) (19)).

Sec. 87 regulates the right of adjoining owners to erect party walls on the boundary line of their lands. Secs. 88–90 determine the rights of building owners to deal with party structures, by repair or underpinning, or by rebuilding. Except where the party structure is dangerous, the building owner must give a month’s notice before interfering with a party fence wall, or two months’ notice before dealing with any other party structure, and in his operations must erect all necessary hoardings, and avoid unnecessary inconvenience to the adjoining owners and occupiers (*Fillingham v. Wood*, [1891] 1 Ch. 51 ; *List v. Tharp*, [1897] 1 Ch. 266), who may give

a counter notice requiring the building owner to put in the new structure certain structures for the convenience of the adjoining owner. Disputes settled by surveyors appointed by the owners, subject to a reference to County Court or the High Court (ss. 91-92). The respective owners may be required to give security before the works are begun (s. 94). The mode of bearing and recovering the expense is regulated by secs. 95-102. The structure of party walls is regulated by Part VI. of the Act, which goes into detail as to recesses, bressumers, and openings, chases, and the height to which they must run above the roof (ss. 54, 56, 58, 59, 60, 74, 77).

The London legislation does not affect easements of light or air (*Croft v. Haldane*, 1867, L. R. 2 Q. B. 194; 57 & 58 Vict. c. 213, s. 101).

There is no legislation as to party walls outside London, but under the Public Health Acts by-laws may be made affecting these structures.

The subject is fully dealt with in Emden, *Building Contracts*, 3rd ed. c. p. 252, and Beven on *Negligence*, 2nd ed., 620; and see Glen, *London Building Act*; Chit. Stat. tit. "Metropolis"; Hunt, *London Local Government*.

Passage Court of Liverpool.—1. This Court is an ancient Court of record for the trial of civil causes within the borough of Liverpool (Court of Passage Act, 1834, 4 & 5 Will. iv. c. xcii.). It was formerly held before the Mayor and bailiffs of the borough, but a qualified legal assessor was appointed under the Act of 1834, who provided that the Court should not act without the assessor's assistance (s. 2). Under the recent changes effected by the Liverpool Court of Passage Act, 1893 (56 & 57 c. 37), the assessor is now the presiding judge (s. 6), and powers corresponding to those of a judge of the High Court sitting at *novus prius* or in chambers are ("subject to rules of Court"; see below, 1) conferred upon him (*ibid.*). The registrar of the Court has also ("subject to rules of Court") powers corresponding to those of a district registrar, master, and associate of the High Court (s. 7). The presence of the Mayor and bailiffs in the Court had long before been dispensed with (Court of Passage Act, 1838, 1 & 2 Vict. c. xcix. s. 8).

2. An action may be commenced in the Court when the defendant, or one of the defendants, resides or carries on business at the time of commencing the action within the jurisdiction, or, by leave of the judge or registrar when the whole, or any part of the cause of action has arisen within the jurisdiction. But, except where the whole cause of action has so arisen, an action of which the County Court has cognisance, and in which the claim does not exceed £20, is to be commenced in the Court (Act of 1893, s. 2). The High Court may remit any action of contract which might have been commenced in the Passage Court to it where the claim does not exceed, or is reduced to, £100 (s. 3). Similarly, an action of tort may be remitted where the plaintiff has no visible means to pay costs, unless he give security, or satisfies a judge of the High Court that the action is fit to be prosecuted in the High Court (s. 4). On the other hand, an action may be removed from the Passage Court by *certiorari* or otherwise, if a judge shall "deem it desirable" for the action to be tried in the High Court (s. 5).

3. An appeal lies from the registrar to the presiding judge (s. 9), or (if so provided by rule, see below, 5.), if he is not holding a Court when the appeal is ready for hearing, to the judge of the High Court in chambers (Act of 1896, s. 2); and there is an appeal from the presiding judge to the Court of Appeal (*Anderson v. Dean*, [1894] 2 Q. B. 222) in cases where a

appeal would be allowed on a trial at *nisi prius*, and subject to the same rules, regulations, and provisions (Act of 1893, s. 10).

4. The rules and procedure of the Common Law Procedure Acts were applied to the Court (with certain exceptions, as to which see the Court of Passage Act, 1863, 16 Vict. c. xxi., and the Order in Council of 27th November 1854), and also the summary procedure provisions under the Bills of Exchange Act, 1855, ss. 1 to 7 (Order in Council, 30th January 1856). Under the Acts and Orders cited, the assessor, registrar, and serjeant-at-mace of the Court had powers corresponding respectively to those of the Court or a judge, a master, and the sheriff in the High Court.

5. After the Judicature Acts a rule was passed applying the new procedure *en bloc* to the Passage Court (December 1876, set out in *Ex parte Spelman*, [1895] 2 Q. B. 174); and a procedure following that in use in the High Court has been adopted in the Passage Court. It was, however, held that the power to give summary judgment under Order 14 (*Ex parte Spelman*, *supra*; see *Speers v. Daggers*, 1885, 1 C. & E. 503), or to decide questions summarily on interpleader (*l.c.*), does not extend to the Passage Court. A power to apply the High Court rules of procedure and practice to the Passage Court (with the concurrence of the rule making authority of the High Court) was conferred on the presiding judge by the Act of 1893 (s. 8; and see Liverpool Court of Passage Act, 1896, 59 & 60 Vict. c. 21, s. 2).

New rules under the recent Acts have been drawn up, but they are not yet issued.

6. Where any action is brought in the Passage Court which could have been brought in a County Court, and a less sum than £10 is recovered, the plaintiff is not to recover more than County Court costs (Act of 1896, s. 3). By the Court of Passage Act, 1863 (ss. 66, 67, 68), it was provided that the plaintiff should have no costs in any action of covenant, debt, detinue, or assumpsit, not being an action for breach of promise, if he recovered no more than £5, or in any action of trespass, trover, or case, not being for malicious prosecution, libel, slander, criminal conversation, or seduction, where he recovered no more than 40s., unless the assessor or presiding officer certified for costs, or was satisfied that the action could not have been brought in the County Court, or unless judgment went by default. This provision does not seem to have been repealed (see, however, as to actions under £20, above, 2.).

For the scale of costs in the Court adopted in 1877, as amended in 1884, see Johnson on *Costs*.

7. For the purpose of issuing execution, a judgment of the Passage Court may be removed to the High Court (Act of 1838, s. 3; see *Annual Practice*, 1898, p. 802).

8. The Court has also an important Admiralty jurisdiction corresponding to that of the County Court (see vol. i. p. 142; *Fellowes v. The Owners of the Lord Stanley*, [1893] 1 Q. B. 98; and Williams and Bruce, *Admiralty Practice*, 2nd ed., p. 232).

Passage Money—The sum claimable for the conveyance of a person with or without luggage on the water. The difference between freight and passage money is this, that the former is claimable for the carriage of goods, and the latter for the carriage of the person. If a passage by a particular ship is not provided according to contract, there is at common law a right to the return of the passage money and damages;

if it merely becomes impossible, and that through no fault of the party, e.g. by the previous destruction of the vessel, there is a total failure of consideration, and the money is returnable; but if the destruction does not happen until after the voyage specified in the contract is begun, although the passenger has not gone on board, the failure of consideration being partial under a contract which is entire, the passage money cannot be recovered back (*Gillan v. Simpskru*, 1815, 4 Camp. 241; 16 R. R. 784). A cabin or steerage passenger, if relanded at the request of the emigration officer on account of his own sickness, or the sickness of any member of his family, and left behind, is entitled, the steerage passenger to a return of the whole of the passage money for himself and any of his family so left; but a cabin passenger to only one-half (M. S. A. 1894, s. 308). The baggage of a passenger may be detained for the passage money, but the passenger himself cannot be detained, nor the clothes taken from his person (*Wolf v. Summers*, 1811, 2 Camp. 631; 12 R. R. 764). As to validity of insurance of passage money, see M. S. A. 1894, s. 335, and *Denoon v. Home and Colonial Ass. Co.*, 1872, L. R. 7 C. P. 341). See PASSENGERS (SEA).

Passator—He who has the interest or the command of the passage of a river, or a lord to whom a duty is paid for passage (Toml. *Law Dict.*)

Passenger.—The law as to passengers will be found discussed under the following headings: CARRIER; PASSENGERS (SEA); RAILWAY.

Passengers (Sea); Passenger Boats.

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I. COMMON LAW RIGHTS AND LIABILITIES.—The liability of a shipowner under a contract to carry persons by sea is not the same as is under a contract for the sea carriage of goods. In the latter case the carrier has the liability of an insurer, viz. to carry against all risks, except the act of God, the Queen's enemies, and such risks as are excluded by the contract between him and the passenger (see AFFREIGHTMENT); in the former case his duty is only to "take due care, including in that term the use of skill and foresight to carry the passenger safely," "due care" however, "undoubtedly meaning, having reference to the nature of the contract to carry, a high degree of care, and casting upon the carrier the duty of exercising all vigilance to see that whatever is required for the safe conveyance of his passengers is in fit and proper order" (*Readhead v. Midland Ry. Co.*, 1867, L. R. 4 Q. B. 379, 391, 393). A carrier of passengers by sea is not liable for a latent defect in the ship, and thus does not warrant her seaworthiness, but his undertaking binds him to provide a ship as safe and seaworthy as care and skill can render it (*Readhead's case*, ante; *Hym v. Nye*, 1881, 6 Q. B. D. 685, 690).

A shipowner who contracts to carry a passenger from one place

another is liable to him for any injury suffered by him due to the negligence of his servants while acting in the scope of their employment, though such negligence be criminal, provided that it is not wilful; and he is liable in the same case, and under the same conditions, to a passenger carried in another ship, although the servants of the owner of the other ship were equally or partly negligent, *e.g.* passenger killed by a collision between two ships which are both in fault (*The Druid*, 1842, 1 Rob. W. 391; *The Bernina*, 1888, 13 App. Cas. 1; *The Orwell*, 1888, 13 P. D. 80). The liability of a shipowner, however, in such a case, if the loss or injury happens without his actual knowledge or privity, is limited to £15 for every ton of his ship's tonnage (M. S. A. 1894, s. 503; see LIMITATION OF LIABILITY); and a railway company carrying passengers and goods partly by land and partly by sea is entitled to limit its liability for such a loss or injury under such conditions (*James v. L. & S.-W. Ry. Co.*, 1872, L. R. 8 Ch. 241). A shipowner who undertakes to carry a passenger from one place to another is also liable to him for injuries sustained by him on board a ship belonging to another person, but used by the shipowner, although the shipowner's servants are not guilty of the particular act of negligence which caused the injury (*John v. Bacon*, 1870, L. R. 5 C. P. 437). He can, however, exclude his liability towards his passenger by express contract; and thus an exception of "loss or damage by perils of the seas" has been held to exclude liability for the death of a passenger due to the neglect or act of the master, pilot, or crew causing a collision (*Haigh v. Royal Mail S. P. Co.*, 1883, 5 Asp. 189).

As regards passenger's luggage, the shipowner has the liability of a common carrier, *i.e.* is liable for its loss, whether caused by his or his servants' negligence or not, unless (by analogy from cases of carriage of passenger luggage by train) the luggage is kept under the control and in the possession of the passenger, and the passenger by some act or default contributes to its loss (*G. W. Ry. Co. v. Bunch*, 1888, 13 App. Cas. 31, 42); or unless the shipowner protects himself by his contract against liability for its loss whether by his servants' negligence or (perhaps) his own (*Wilton v. R. A. M. S. Co.*, 1861, 10 C. B. N. S. 453, negligence of captain; *Taubman v. Pacific S. N. Co.*, 1872, 1 Asp. 336, wilful default of the shipowner's servants held waived under an exclusion of liability "under any circumstances whatsoever").

The validity of such a contract depends upon the law which the parties intended should govern it; and that law is *prima facie* the law of the country where the contract is made. Thus an exception in a contract for sea carriage of a passenger from England to Mauritius that the carrier was not to be liable for loss or damage to passenger's luggage was held to be good, as being allowed by the English law (the *lex loci contractus*), though invalid by the French law, which is the law of Mauritius (*P. & O. S. N. Co. v. Shand*, 1865, 2 M. L. C. 244; and see *The Industrie*, [1894] Prob. 58). But the law of the flag under which the ship sails may be the law the parties meant should be applicable to the contract; and it will then determine its meaning (*Lloyd v. Guibert*, 1865, L. R. 1 Q. B. 115; *In re Missouri S.S. Co.*, 1889, 42 Ch. D. 321; and see AFFREIGHTMENT).

The terms of a contract which exonerates the shipowner from liability for damage, loss, or injury to the passenger or his luggage, must be brought to the notice of the passenger, or he will not be bound by them; and this is a question of fact. Thus where a steerage passenger received a ticket in which there were printed terms folded up so that she could not see them, and although knowing that there was writing inside, did not read

it or know that it contained conditions relating to the carriage of passengers it was held that the carrier did not do what was enough to give her notice of the contract, and a jury might find him liable (*Richardson v. Rou* [1894] App. Cas. 218). On the other hand, where a passenger received a ticket bearing on its margin, "issued subject to further conditions printed on back hereof," and on the face of the ticket there was printed "the passenger saw but did not read, containing a clause that shipowners were not responsible for loss of luggage under any circumstances, and luggage, containing money, was stolen, probably by one of the crew," it was held that the passenger had reasonable notice of the conditions and was bound by them, though he had not read them (*Acton v. Castle P. C.*, 1895, 8 Asp. 73).

A shipowner is also not liable for loss or damage by fire, without actual fault or privity, to anything taken in or put on board his ship, nor is he liable where gold, silver, diamonds, watches, jewels, or precious stones, taken in or put on board his ship, the true nature and value of which have not at the time of shipment been declared by the owner or shipper thereof to the owner or master of the ship in writing, are lost or damaged by robbery, embezzlement, making away with, or secreting thereof, whether by passengers or crew, without his actual fault or privity (*M. S. A. s. Acton v. Castle Mail P. C.*, above).

Where there is an entire contract by a sea carrier to carry passengers by land and partly by sea, the contract is divisible, and the carrier must protect himself under any provision of the Carriers Act for a loss happening on the land stage of the journey (*Le Conteur v. L. & S.-W. Ry. Co.*, 1865, 1 Q. B. 54). Passengers' luggage is not "goods" in the meaning of the Admiralty County Courts Act, 1869 (s. 2), and a County Court cannot exercise Admiralty jurisdiction in respect of it (*R. v. Judge of the C. London Court*, 1883, 12 Q. B. D. 115). Passengers' personal effects are not subject of general average or salvage (*Brown v. Stapylton*, 1827, 4 B. & C. 119; *The Willem III.*, 1871, L. R. 3 Ad. & Ec. 487); but their luggage and valuables in custody of the ship, and not in daily use, are perhaps liable for the claim (Kennedy, 52; and see AVERAGE; SALVAGE).

A carrier of sea passengers is, perhaps, bound to receive and carry any person who is willing to contract with him, if there is room on board the ship, and the passenger is a proper person to be carried. It is doubtful if a carrier can refuse to carry a passenger who has paid his fare, and then refuse to be carried on the terms of the contract as expressed in the passage ticket for "the moment the money is paid the obligation to carry begins," and perhaps in such a case the carrier is bound to carry upon the terms of his common-law liability, unless a special contract be entered into with the passenger (Lord Chelmsford, *Henderson v. Stevenson*, 1875, L. R. 2 H. L. (Sc.) 477). He cannot refuse to carry as passenger a notorious pickpocket whom he has agreed to carry, so long as he behaves properly on board (*Copp v. Braithwaite*, 1844, 8 Jur. 875).

A passenger cannot require that the ship, by which he is to be conveyed, shall begin her voyage at the time advertised, and claim to consider the contract at an end in default of this, unless it is warranted at the time of the contract that the ship shall do so; it is enough if the voyage is begun within a reasonable time (*Yates v. Duff*, 1832, 5 Car. & P. 369; *Crane v. Tyne Shipping Co.*, 1897, 13 T. L. R. 172). But if the date of sailing is a warranty, the contract is broken if the ship does not sail at the time warranted (*Cranston v. Marshall*, 1850, 5 Ex. Rep. 395). The carrier is liable for unreasonable delay in beginning or prosecuting the voyage causing da-

to his passengers, but in such case his liability only extends to the damages which are the reasonable consequences of his default (cp. *Le Blanche v. L. & N.-W. Ry. Co.*, 1876, 1 C. P. D. 286, a train case); and thus a passenger who misses a train (owing to the unpunctual arrival of a steamer) and hires a special train, cannot recover the cost of so doing from the steamship's owner, unless he can show that the expenditure is one which he would have incurred if he had missed the train by his own fault, and not by that of the steamship's owner (*Bright v. P. & O. S. N. C.*, 1897, 2 Com. Cas. 106). The shipowner can also protect himself by contract from this liability; thus where passengers were being carried under a contract whereby shipowners were not liable for "loss or delay by the act of God . . . perils of the sea . . . or wrongful act or default of their servants," and the ship was wrecked and the master landed the passengers, and the next day transhipped them by a passing steamer to their destination, it was held that the shipowners being under no obligation to forward the passengers to their destination, the master's doing so did not bind them (*The Mariposa*, [1896] Prob. 273). There are statutory provisions dealing with the forwarding of passengers on the ship being wrecked (see *post*).

Every passenger is subject to the authority of the master of the ship; and must obey all orders of his which are necessary for the safety of the ship and all on board, and the discipline of the crew; and on his failure to do so the master may deal with him as the necessity of the case requires, e.g. ironing a passenger because of an imminent mutiny is justifiable (*King v. Franklin*, 1858, 1 F. & F. 360); and so is putting a passenger in irons who refused to take up the position assigned him by the master for an expected fight with enemies (*Boyce v. Bayliffe*, 1807, 1 Camp. 58). But such power of the master does not extend beyond what the necessity of the case requires; and in the last-mentioned case keeping the passenger in irons the whole night, though the expected fight did not take place, was held unjustifiable (*Boyce v. Bayliffe*, above); and an imprisonment for seven days for an alleged insult to the captain has been held unjustifiable (*Aldworth v. Stewart*, 1866, 2 M. L. C. 383). A master has also been held to have power to exclude from table a passenger behaving offensively, or threatening him with personal violence (*Prendergast v. Compton*, 1837, 8 Car. & P. 454).

Although a passenger is thus at the disposal of the ship in case of emergency, he may have a claim against her owner for salvage, if he remains voluntarily on board her when in distress at a time when he is not obliged to do so, and renders service to her (*Newman v. Walters*, 1804, 3 Bos. & Pul. 612; 7 R. R. 886; *The Branston*, 1826, 2 Hag. Adm. 3 n.; *The Vrede*, 1861, Lush. 322).

The money payable by a passenger for his safe conveyance to the shipowner is called "passage money"; it is due when usage determines, if the time is not specified in the contract. When paid, and the voyage has begun, it cannot be recovered back (*Gillan v. Simpkin*, 1815, 4 Camp. 241; 16 R. R. 784); but there are statutory provisions now dealing with this case. Passage money, being a kind of freight, though not included in freight except by usage (*Denoon v. Home and Colonial M. I. C.*, 1872, L. R. 7 C. P. 341), is the subject of salvage (*The Medina*, 1876, 1 P. D. 272; 2 *ibid.* 5). There is a lien for the passage money on the passenger's luggage, though not on the passenger himself or his clothes (*Wolff v. Summers*, 1811, 2 Camp. 631).

II. STATUTORY RIGHTS AND LIABILITIES.—The following are the statutory provisions with regard to passengers and emigrants contained in the M. S. A. 1894, reproducing the provisions of former Acts:—

(1) *Definitions*.—The word “passenger” means any person carried in a other than the master and crew, and the owner, his family and servant someone who pays for his passage; and thus a seaman working out his passage (The *Hanna*, 1866, L. R. 1 Ad. & Ec. 291), or the wife and mother-in-law of the captain, are not passengers for the purpose of the Act (The *Lion*, [1866] L. R. 2 P. C. 525); nor are distressed British seamen brought home by a British ship under a conveyance order of a British consul for whom 10 shillings each per day was paid by the Board of Trade (The *Clymene*, [1866] Prob. 295); nor is a pleasure party allowed by the owner of a steamer to take her on an excursion in a river, without paying for it, but giving to the master a gratuity for himself and the crew and the coals (H v. *Hooker*, 1889, 6 Asp. 386). The word “passenger-steamer” means a British steamship carrying passengers to, from, or between places in the United Kingdom (except steam ferry-boats working in chains, commonly called steam bridges), and any foreign steamship carrying passengers between places in the United Kingdom (s. 267). An “emigrant ship” means any seagoing ship, whether British or foreign, and whether or not conveying mails, on a voyage from the British Islands to any port out of Europe not within the Mediterranean Sea, or on a colonial voyage, *i.e.* a voyage from any port in a British possession other than British India and Hong Kong, to any port whatever, where the distance between such ports exceeds four hundred miles, or the duration of the voyage exceeds ten days (ss. 270, 364, 365); and which carries more than fifty steerage passengers or a greater number of steerage passengers than one adult (a person aged twelve, two persons between one and twelve years old being equivalent to one adult) to every thirty-three tons of the ship’s registered tonnage if she is a sailing ship, or one to every twenty tons of her registered tonnage if she is a steamer; and the term includes a ship which, coming from a port outside the British Islands, takes on board at a British port a number of steerage passengers, whether British subjects or resident aliens, as would, with or without the steerage passengers already on board, render her an emigrant ship. A “steerage passenger” means all passengers except cabin passengers. To be a cabin passenger a person must (a) have a space of thirty-six clear superficial feet at least allotted to his exclusive use; (b) sit throughout the voyage at the same table as the master or first officer of the ship; (c) pay a fare which is in the proportion of thirty shillings for a week of the length of the voyage as determined for sailing ships (see s. 269 if the voyage is from Great Britain to a port south of the Equator; twenty shillings if the voyage be from Great Britain to a port north of the Equator; (d) have a duly signed contract ticket in the form prescribed therefor by the Board of Trade, but the mere want of tickets for cabin passengers does not make them steerage passengers, and the ship is not an “emigrant ship” (*Ellis v. Pearce*, 1858, El. B. & E. 431). The word “steerage passage” means the passages of all others but cabin passengers. The “upper passenger deck” means the deck immediately beneath the upper deck or the poop or round-house and deck-house, when the passenger cabin or steerage, carried therein exceeds one-third of the total capacity of the ship; the “lower passenger deck” means the deck next below the upper passenger deck, which is not an orlop deck (s. 268). The length of voyage for emigrant ships is determined by scales fixed by the Board of Trade and published in the *London Gazette*, and different lengths may be fixed for different descriptions of ships (s. 269 of the Act).

(2) *Passenger Boats*.—Every passenger steamer carrying more

twelve passengers must be surveyed once a year, and may not ply or go to sea on any voyage or excursion with passengers unless the owner or master has a proper certificate of survey from the Board of Trade. If she attempts to do so, she may be detained till such certificate is produced to the proper customs officer; but if she is an emigrant ship and has complied with the provisions as to survey, in such case she is exempt from this necessity (s. 271). The owner of a passenger steamer must have her surveyed by a shipwright surveyor and an engineer surveyor; and if the ship is an iron steamer the engineer surveyor must be properly qualified to survey her in the opinion of the Board of Trade. The shipwright surveyor in his declaration of survey must state that the hull, boats, life-buoys, lights, signals, compasses, and shelter for deck passengers are in proper condition; the time, if less than a year, that they will continue so; the limits (if any) beyond which, so far as the hull and equipments are concerned, the steamer should not ply; the number of passengers which she is fit to carry, distinguishing, if necessary, the number to be carried on the deck and in the cabins or different parts thereof, subject to necessary conditions and variations required by the time of year, the nature of the voyage, the cargo carried, etc.; and that the certificates of the master and mate are such as are required. The engineer surveyor must state in his declaration of survey that the machinery is in good condition, and the time for which it will be sufficient; that the safety valves and fire-hose are in proper order; the limit of weight to be placed on the safety valves; the limits beyond which, as regards her machinery, the steamer should not ply; and that her engineer or engineers have proper certificates (s. 272). The owner must transmit such declarations, fourteen days after receiving them, to the Board of Trade, under a penalty of being fined ten shillings for each day's delay (s. 273); and the Board, on receipt of them, if satisfied therewith, issues in duplicate a passenger steamer's certificate, stating the limits beyond which (if any) the steamer is not to ply, and the number of passengers she may carry, distinguished, if necessary, as above, and with the conditions or variations to which that number is subject (s. 274). If a shipwright or engineer surveyor refuses to give such a declaration, the shipowner can appeal to the Court of Survey (see SURVEY, COURTS OF) for the port or district where the steamer is; and such Court reports to the Board of Trade on the question; and the Board, if satisfied that the requirements of the report and of the Act have been complied with, may grant a certificate; and costs of the appeal may follow the result. If, however, the shipwright or engineer surveyor, during his survey, is accompanied by a person appointed by the owner, there is no appeal if they both agree (s. 275). It has been held in Scotland that there is no appeal to the Court of Session (and *semble* to the High Court in England) from a surveyor's declaration before resorting to the Court of Survey (*Denny v. Board of Trade*, 1880, 71 Sess. Cas. (4th) 1019). The Board transmits the certificate in duplicate to a superintendent or some proper officer at the port mentioned by the shipowner for the purpose, or the port where he or his agent resides, or where the steamer has been surveyed or is lying, and gives notice of so doing to the master or owner; and the latter can, on applying to that officer and paying the proper fee (Sched. 9), obtain from him both copies of the certificate; to prove the issue of a certificate it is enough to show that it was received by the proper officer, and notice of its transmission received by the owner or master (ss. 276, 277). Such a certificate is of force only for one year, or a shorter time if so expressed, or until the Board give notice to the owner or master that it is cancelled; a

passenger steamer, if absent from the United Kingdom when her certificate expires, is not, however, liable to a fine for want of a certificate till she begins to ply as a passenger steamer again after returning to the United Kingdom (s. 278). It may be cancelled by the Board if it has reason to believe that the declaration of survey was fraudulently or erroneously made in any respect, or was issued upon false or erroneous information, or that the declaration the hull, equipment, or machinery have sustained injury has become insufficient; and the Board may in such case require a new survey (s. 279). A certificate which has expired or been cancelled must be delivered up as the Board directs, on penalty of £10 (s. 280). One of these certificates must, immediately on receipt thereof, be posted up in a conspicuous place on board the steamer, so as to be legible and continually legible while it is in force and the steamer in use, under a penalty of £10; and if the steamer goes to sea with passengers without this having been done, the owner is liable to a fine of £100, and the master to one of £20 (s. 281). Any person forging a certificate or declaration is guilty of a misdemeanour (s. 282). If a greater number of passengers is received on board than that allowed by the certificate, having regard to the time of the occasion, and circumstances of the case, the owner or master is liable to a fine of £20, and an additional fine for every passenger so unlawfully taken on board (s. 283). Colonial certificates for passenger steamers, if certified by the Board of Trade to be equally efficient with those granted as valid in the United Kingdom, may by Order in Council be declared to have the same force as them, and have applied to them all the provisions relating to passenger steamers' certificates which may be thought necessary, and the conditions and regulations with regard to such certificates, and their delivery, and cancellation, as may be thought necessary, with fines up to the limit of £50 for breach of them (s. 284).

A sea-going passenger steamer must be equipped with properly adjusted compasses, hose, deck shelters, and a safety valve on each boiler; and if it goes to sea without being so equipped, the owner and master, if in default, are liable to fines up to £100 and £50 respectively; and the weight may be increased on the safety valve beyond the limits fixed by the surveyor under a penalty of £100 (ss. 285 and 286). Offences in connection with passenger steamers, such as (a) a drunk or disorderly person attempting to obtain admission after being refused leave to do so and having his fare returned to him, or (b) being drunk or disorderly on board, or refusing to leave her after his fare has been returned or tendered to him, or (c) any person, after warning, molesting a passenger, or (d) any person attempting to obtain admission to a steamer after being refused on account of the ship being full, and after his fare has been returned (if paid) or tendered to him, or (e) refusing to leave the steamer, after getting on board when requested to do so on account of the ship being full, under the condition, or (f) travelling or trying to travel in the steamer without paying his fare, and with intent to avoid payment of it, or (g) after paying his fare for a certain distance, proceeding in the steamer wilfully beyond that distance without paying the additional fare, and with intent to do so, or (h) refusing to leave the steamer on arriving at the point to which he has paid his fare, or (i) refusing to exhibit his ticket or to pay his fare when requested to do so—are punishable by fine of not more than 10 shillings, but this does not prevent the fare being recovered from the offender obstructing or injuring the machinery or tackle of the steamer, or obstructing the crew in their duty, is punishable by a fine of £20; and any such offender whose name and address is unknown to the master or

officer of the steamer may be detained without warrant and taken before a justice and tried summarily; and any such offender refusing to give his true name and address on application is liable to a fine of £20, to be paid to the owner of the steamer (s. 287). The master of a home-trade passenger ship may exclude a drunk or disorderly or misbehaving person, or, if he is on board, may land him at any convenient place, and such person if he has paid his fare forfeits it (s. 288).

(3) *Emigrant Ships*.—No emigrant ship which has not a passenger steamer's certificate can proceed to sea till she has been surveyed by two competent surveyors and pronounced seaworthy for the voyage. Such survey must be made before any cargo is aboard beyond what is necessary for ballast, and such cargo may be shifted so as to show every part of the frame of the ship; if she is pronounced unseaworthy, a second survey may be held by three surveyors appointed by the emigration officer; and if they unanimously report that she is seaworthy, she shall be deemed so, but not otherwise; each survey must be at the expense of the owner or charterer; and failure to comply with any of these provisions entails a fine of £100 (s. 289).

Every emigrant ship must be equipped with (a) three steering and one azimuth compass; (b) if going to a place north of the Equator, one chronometer; (c) if going to a place south of it, two chronometers; (d) a proper fire-engine; (e) three suitable bower anchors; (f) if a foreign ship, four proper life-buoys ready always for immediate use; (g) adequate means of signalling by night—under penalty of £50 from the master (s. 290).

No ship may carry passengers, cabin or steerage, on more than two decks, except that cabin passengers, if not more than one for every hundred tons of registered tonnage, and sick persons in hospital, may be carried in a poop or deck house; if steerage passengers are carried under the poop, or in a round or deck house, such poop or house must be properly built and secured—under a penalty from the master of £500 (s. 291). No more steerage passengers may be carried in an emigrant ship on the upper passenger deck, or under the poop, or in the round or deck house, than one adult for every fifteen clear superficial feet of deck allotted to them; or on the lower passenger deck more than one adult for every eighteen such feet; but if the space between the latter deck and the deck above is less than seven feet, or the apertures for light and air (exclusive of side scuttles) less than three square feet to every hundred superficial feet of deck, not more than one adult can be carried for every twenty-five feet of the lower deck; and no more steerage passengers than one for every five superficial feet clear for exercise on the upper deck, poop, or round or deck house; and in that measurement the hospital space and space occupied by personal luggage of steerage passengers is included (Sched. 10); if more than that number be carried (except as increased by births), the owner is liable to a fine of £20 for every person taken in excess (s. 292). Regulations are also made (Sched. 11) for the accommodation of steerage passengers, relating to the construction of passenger decks, berths, hospitals, privies, and supply of light and ventilation—infringement of which is punishable, in the case of master, charterer, or owner, unless the master only is liable by such regulations (*e.g.* 9 and 15), with a fine of £50 (s. 293). No part of the cargo, or steerage passengers' luggage, or the stores for them or the crew, may be carried on the upper or passenger decks except with the consent of the emigration officer and properly stowed, under a penalty of £300 from owner, charterer, or master (s. 294).

A sufficient supply of good provisions and water for the steerage passengers (and those for the crew and all other persons on board must not be of inferior quality to them) must be provided by the own charterer, or master; if the ship obtains clearance without such supply the owner, charterer, and master are each liable to a fine of £300; the provisions and water for the steerage passengers must be surveyed by the direction of the emigration officer at the port of clearance and approved; and he has power to reject any not of pure and wholesome quality, and order the packages or vessels containing them to be landed or emptied and failure to do so, or reshipping them in that or any other emigrant ship, entails a fine of £100 (s. 295). A proper mode of carrying water is prescribed, under penalty of £50 (s. 296); and a smaller supply than that prescribed is only allowed if the ship is going to touch at intermediate ports for taking in water, and there is such a stipulation in the master's bonds, and the emigration officer gives a written approval which goes with the ship's papers during the voyage (s. 297). The master must issue water and provisions to the steerage passengers in accordance with a scale prescribed by the Board of Trade, under penalty of £50 (s. 298) but the Board has power to exempt emigrant ships which provide superior food, space, and accommodation for cabin and steerage passengers to those required by the Act from the regulations of the Act relating thereto (s. 299). The owner or charterer of every emigrant ship must also provide a proper supply of medical stores, approved of in quantity and quality by the emigration officer at the clearing port, and put in charge of the medical officer on board, under a penalty of £50 from the master; such stores must be inspected before sailing by a medical practitioner under the direction of the emigration officer, and certified to be sufficient in quality and quantity, and if an emigrant ship clears outwards and proceeds to sea without such certificate or written permission from the emigration officer dispensing therewith, the master is liable to a fine of £100 (s. 300).

An emigrant ship cannot clear outwards or proceed to sea if she has on board as cargo any explosives, or as cargo or ballast any goods likely to endanger the health or lives of the steerage passengers, or the safety of the ship, or as cargo cattle or horses, except under certain prescribed conditions (Sched. 13), under penalty of £300 (s. 301). Naval and military stores for the public service may be carried as cargo in an emigrant ship by an order of a Secretary of State; but unless the master complies with all the conditions and directions therein he is liable to a fine of £300 (s. 302).

In every emigrant ship in which the steerage passengers exceed fifty or in which the total number of persons on board exceeds three hundred a duly authorised medical practitioner must be carried, who must be legally qualified to practise in some part of the British dominions, approved of by the emigration officer, and properly provided with surgical instruments; most of the steerage passengers, or as many as three hundred of them, if foreigners, any medical officer, legally qualified or not, if approved of by the emigration officer, may go therein, and any medical officer so going is rated on the ship's articles; failure to comply with any of these requirements entails a fine on the master of £100, and any person going without trying to go as medical officer in an emigrant ship in breach thereof is liable to a fine of £100 (s. 303). Every emigrant ship, if carrying more than a hundred steerage passengers, must carry a steerage steward and also a steerage cook; if carrying more than three hundred adults, two steerage cooks; she must also have a proper place for cooking on deck, with proper

apparatus and supply of fuel to the satisfaction of the emigration officer; and a foreign emigrant ship in which half of the steerage passengers are British, unless not less than three of the officers understand or speak English, must also carry one interpreter if the steerage passengers are not more than two hundred and fifty, and two if they exceed that number, under a penalty of £50 from the master (s. 304). Every emigrant ship must also be manned with an efficient crew to the satisfaction of the emigration officer, under penalty of £50 from the master; if the emigration officer thinks the crew inefficient, the owner or charterer may appeal to the Board of Trade, which, at his expense, appoints two other emigration officers or other competent persons to examine into the matter, and their unanimous opinion is conclusive (s. 305).

Before clearing outwards the steerage passengers and crew must be medically inspected, either on board or before embarkation, as the emigration officer appoints, under a penalty of £100 from the master (s. 306). Any persons whose condition, for medical reasons, may require it, may be refused leave to embark, or ordered to reland, under penalty from the master or the passenger refusing to land; the passenger so relanded is entitled to subsistence money till he is re-embarked, or declines to proceed, or his passage money has to be returned to him (s. 307). A person who has been so relanded for medical reasons, if he delivers up his contract ticket, though the ship has not sailed, is entitled to recover summarily the whole of his passage money if he is a steerage passenger, and half if he is a cabin passenger (s. 308).

The master of an emigrant ship, before she proceeds to sea, must, with the owner or charterer, or, in their absence, one other good and sufficient person approved by the chief officer of customs at the port of clearance, enter into a joint and several bond, the form of which is statutory (Sched. 14), of £2000 to the Crown, which is executed in duplicate and is exempt from stamp duty; and if neither the owner nor charterer reside in the British Islands the bond shall be for £5000, and shall also contain an undertaking to pay to the Crown, as a Crown debt, all expenses of forwarding to their destination steerage passengers who, owing to shipwreck and the like causes, do not reach their destination in the ship (s. 309); the chief officer of customs gives a certificate of the execution of the bond on one part of it, and if the ship clears for a British possession sends that part of it to the Government of such possession; such certificate is evidence of the bond in the Courts of that possession; such a bond is not available there till three months after the ship's arrival there, or in the British Islands till twelve months after her and the master's return thither (s. 310).

The master of every ship carrying steerage passengers on a voyage from the United Kingdom to any port out of Europe and not within the Mediterranean Sea, or on a colonial voyage, must, before clearance, sign a passengers' list in duplicate, giving the name and other particulars of the ship and of every passenger on board; one of these is kept by the master (known as the master's list), the other by the customs officer giving clearance, under penalty of £100 from the master (s. 311). If any passengers are embarked after clearance, their names must be added to the list, and also put on a separate list, which is given to the customs officer; if there is no customs officer at the port where such passenger embarks, the list must be given to the customs officer at the next port having such an officer at which the ship arrives; where any additional passenger is taken on board, a fresh certificate from the emigration officer of the port, of having complied

with these requirements, is required; and breach of any of these provisions entails a fine of £50 (s. 312). A person attempting to gain a passage without payment, and any person aiding and abetting him, is liable to a fine up to £20, or in default to imprisonment up to three months with or without hard labour; and any person so found on board may be dealt with summarily before a justice (s. 313).

An emigrant ship cannot proceed to sea until the master has obtained a certificate of clearance from the emigration officer, which certificate is in the discretion of the emigration officer (*Steel v. Schomberg*, 1855, El. & Bl. 620), stating that all the foregoing requirements have been complied with; and an appeal is given from a refusal to grant such certificate to two other officers or other suitable persons appointed by the Board of Trade who can jointly give a certificate of clearance (s. 314). The master of an emigrant ship must give facilities for her inspection at any British port to which he arrives to the emigration officer there, and in the case of a British ship to the consul at any port elsewhere, under penalty of £50 (s. 315). An emigrant ship which, after clearance, is kept in port seven days, or puts into any British port, must not sail again till she has replenished her stores or made good her damage, and has obtained a certificate of clearance, under a penalty of £100 from the master (s. 316); if she puts into any British port after clearance, her master must report her arrival to the emigration officer, and send him the list of passengers, under penalty of a fine of £20 (s. 317). If an emigration officer refuses to give a certificate of clearance, the shipowner may appeal to a Court of Survey, and the procedure followed is the same as that in the case of survey of passenger steamers in sec. 275, above (s. 318). An emigrant ship going to sea without the master's having got a certificate of clearance, or which, after putting into a British port in a damaged state, leaves or attempts to leave without such certificate, may be forfeited to the Crown and seized by any customs officer in any port in British dominions within two years after the offence, but she may be released by the Board of Trade on payment to the Crown of a maximum sum of £2000 (s. 319).

Any person, except the Board of Trade and their subordinates, receiving passage money from a cabin or steerage passenger in an emigrant ship going from the British Islands to any port out of Europe and not within the Mediterranean Sea, must give a contract ticket signed on behalf of the ship in a form approved by the Board of Trade and published in the *London Gazette*, and exempt from stamp duty, under penalty of £50 (s. 320). A remedy by summary proceedings is given for breach of such contract, and damages and costs may be recovered up to £20, in addition to the passage money, if the passenger has not received compensation under any other statutory provision (s. 321). A passenger who fails to produce his contract ticket without good cause on demand by a proper officer, or an owner or charterer who fails in the like way to produce the counterpart of such a ticket, is liable to a fine of £10 (s. 322); and a penalty of £20 is imposed on anyone altering or inducing anyone to part with or destroying a contract ticket (s. 323).

Sanitary and medical regulations for emigrant ships may be made by Order in Council. Obedience to such regulations may be exacted by the medical officer and master; and failure to obey them, or obstructing the officers in performing their duties thereunder, or being riotous and insubordinate, entails a fine, which may be accompanied with imprisonment (ss. 324 and 325). The sale of spirits to steerage passengers directly or indirectly is prohibited, on penalty of a fine of £20 (s. 326).

Steerage passengers are entitled to maintenance on board the ship for forty-eight hours after their arrival at the end of their voyage, unless the ship sooner leaves the port to prosecute her voyage farther, under a penalty of a fine of £5 from the master (s. 327). They are also entitled, if a passage is not provided for them according to their contract (and that passage has been paid for), either in the ship named or an equally eligible one sailing ten days afterwards, and have not in the latter case been paid subsistence money, to recover summarily all money they have so paid, and compensation up to £10 for the loss and inconvenience so caused (s. 328). Any ship, whether emigrant or otherwise, which does not proceed to sea before 3 p.m. on the day after the day fixed in the contract for embarkation, must pay subsistence money to every steerage passenger till the ship proceeds on her voyage, at a fixed rate; but if the steerage passengers are maintained on board as if the voyage had begun, subsistence money is not payable for the first two days after embarkation, nor if the ship is unavoidably detained by wind or weather, or other cause beyond the control of the owner, charterer, or master (s. 329). No steerage passenger must be landed from any ship, except with his consent or by necessity caused by sea perils or accident, at any other port than that named in the contract, under penalty of £50 on the master (s. 330).

Certain provisions are also made in case of shipwreck. Where any emigrant ship is wrecked in or near the British Islands, or returns damaged thereto, the master, owner, or charterer must in forty-eight hours give a written undertaking to the nearest emigration officer, in the former case, that he will embark and convey the steerage passengers in another eligible ship starting within six weeks for the original destination; or in the latter case, that the same ship will sail again within six weeks thither. During that time the steerage passengers must either be maintained on board as if they were at sea, or they must be paid subsistence money; and if they are lodged in any hulk or place under the control of the Board of Trade, such subsistence money is paid to the emigration officer. If the substituted ship or the damaged ship respectively does not sail within the time specified, the steerage passengers or the emigration officer can recover summarily the passage money paid; steerage passengers may, in the discretion of the emigration officer, be removed from a damaged ship at the expense of the master, and a refusal to leave is punishable by fine and imprisonment (s. 331). Where any passengers, cabin or steerage, are rescued from a ship carrying steerage passengers from any part of Her Majesty's dominions which is lost or damaged, or any boat, raft, etc., and are conveyed to a port in the United Kingdom, or in a British possession, or elsewhere, the expense of that conveyance may be defrayed by a Secretary of State, the governor, or the consular officer respectively (s. 332). Passengers, whether cabin or steerage, in a ship carrying any steerage passengers from a port in British dominions, which by no fault of their own find themselves at a port outside the British Islands other than their destination, may be forwarded by the governor, if that port be within a British possession, or if the place be elsewhere, by the British consul there, to their original destination, unless the master of the ship within forty-eight hours of arrival undertakes in writing to such an officer to convey them thither in six weeks' time, and so conveys them; and passengers so forwarded cannot recover either their passage money or compensation for its loss (s. 333). The expenses of so conveying wrecked passengers and forwarding passengers may be recovered as a Crown debt from the owner, charterer, and master of the passengers' ship; a certificate under the hand of a Secretary

of State, governor, or consul, stating the amount of the expenses, is sufficient evidence of the amount and propriety of such expenses in an proceeding to enforce such debt, unless the defendant proves that such certificate is false and fraudulent, and the expenses are not proper. A greater sum cannot be recovered for such expenses than twice the amount of passage money received or due and recoverable for all passenger whether cabin or steerage, embarked in the ship (s. 334). Any steerage passage or any steerage passage or compensation money may be insured by a person liable to provide such passage, or pay such money, or incur any such risk (s. 335). See MARINE INSURANCE.

The following provisions apply to emigrant voyages to the United Kingdom. The master of every ship bringing steerage passengers to the British Islands from any port out of Europe, and not within the Mediterranean Sea, must, in twenty-four hours after arrival, deliver to the emigration officer of the port a list of steerage passengers, describing the name, age, calling, and place of embarkation of every passenger embarked, and any births or deaths among steerage passengers, under penalty of a fine of £5 (s. 336). If any such ship brings more steerage passengers than is allowed in the case of emigrant ships proceeding from the British Islands, the master is liable to a fine of £10 for every adult constituting such excess (s. 337). The master of such ship must also issue to steerage passenger proper provisions and water, in the same quantities as those required in the case of emigrant ships sailing from the British Islands, under penalty of a fine of £50 (s. 338). Foreign ships carrying passengers, cabin or steerage to or from any port of the United Kingdom as her port of destination or of departure, are subject to the liability attaching on British ships to registered births and deaths occurring on board (see BRITISH SHIP; s. 339).

No provision of the Act is to abridge any right of action accruing to a steerage passenger or any other person for breach of a contract for passage (s. 340).

(4) *Passage Brokers.*—A passage broker (for the purposes of the M. S. A. is a person who is concerned in selling or letting steerage passages in any ship proceeding from the British Islands to any place out of Europe, not within the Mediterranean Sea, and he is liable for any acts or defaults of his agents or persons acting under his authority (s. 341); and it has been held that the “selling” or “letting” must be of a passage to commence at a definite time for a specified voyage (*Morris v. Howden*, [1897] 1 Q. B. 378, 381). He must enter, with two sureties approved by the nearest emigration officer (but the bond of a guarantee society, approved by the Treasury may be accepted by the emigration officer in place of these), into a bond to the Crown of one thousand pounds, and obtain a licence to act as such broker; such bond must be renewed every time a licence is obtained, and is not liable to stamp duty; it is executed in duplicate, one part being deposited with the Board of Trade, and the other with the emigration officer. These provisions do not apply to either the Board of Trade or their agents, or any passage broker’s agent; a breach of any of them entails a fine up to £50 (s. 342). Such licence may be obtained from the licensing authority for the broker’s place of business, on proof being given to it of the making and depositing one part of such a bond, and of having given the Board of Trade sufficient notice of an intention to apply for such licence. Such a licensing authority is—(a) in London, the justices at petty sessions; (b) elsewhere in England, the council of a county borough or county (s. 343). Such a licence remains in force till thirty-one days after the 31st December in the year in which it is granted; it may be forfeited by

the broker being convicted of an offence or breach of the foregoing requirements by any Court, which must send the Board of Trade forthwith notice of its order (s. 344). No passage broker may employ any agent in his business except a person holding an appointment signed by him, and countersigned by the nearest emigration officer, and such agent must produce on request such appointment to any emigration officer or person treating for a steerage passage, under penalty of £50 (s. 345). Passage brokers must keep conspicuously exhibited in their office a list of their agents and emigration runners, and send a copy of it to the nearest emigration officer, and report changes therein within twenty-four hours of their taking place, under penalty of £5 (s. 346).

(5) *Emigrant Runners*.—An emigrant runner is any person other than licensed passage brokers and their salaried clerks who, in or within five miles of the outer boundaries of any port, for hire or reward, or the expectation thereof, directly or indirectly conducts, solicits, influences, or recommends any intending emigrant to or on behalf of any passage broker, or owner, charterer, or master of a ship, or any keeper of a lodging-house, tavern, or shop, or any money-changer or other dealer or chapman, for any purpose connected with the preparations or arrangements for a passage, or who gives or pretends to give to any intending emigrant any information or assistance in any way relating to emigration (s. 347). A licence may be issued by the licensing authority for passage brokers, for the place where the emigrant runner wishes to carry on business, to an emigrant runner on his application and the written recommendation of an emigration officer, or chief-constable, or head officer of police in such place; such licence must be lodged, within forty-eight hours of its being granted, with the nearest emigration officer, who must register the emigrant runner and supply him with a badge; and such licence remains in force till the 31st December of the year in which it is granted, unless sooner revoked for an offence under this Act, or other misconduct or forfeiture; any change in the runner's abode must be registered; in case of renewal of a licence, only the date of its renewal need be registered (s. 348); and a new badge may be granted, if necessary (s. 349). No person may act as such a runner until duly licensed and registered, or use a badge not lawfully issued to him, nor employ as such runner an unqualified person (s. 350). Penalties are imposed for misconduct of an emigrant runner in connection with his badge, licence, and notifying change of abode (s. 351). No emigrant runner can recover any commission or fee from a passage broker, unless acting under his written authority; nor can he demand any fee or reward from an intended emigrant for procuring his steerage passage, under penalty of a fine of £5 (s. 352).

Any person guilty of fraud, false representation, or false pretence in procuring a steerage passage, is liable to a fine of £20 (s. 353); and any such offence in connection with assisting emigration is punishable by a fine up to £50 (s. 354).

(6) *Emigration Officers* and their assistants may be appointed and removed in Great Britain by the Board of Trade, and in a British possession by the governor thereof; all powers, functions, and duties exercisable by, to, or before an emigration officer may be exercised and performed by, to, or before his assistant, or, in their absence by, to, or before the chief officer of customs at the port; and a person lawfully acting as an emigration officer is not personally liable for payment of money or costs, or otherwise, in any proceedings by him as an emigration officer and in the public service (s. 355).

Fines and forfeitures are recoverable by emigration officers, chief officer of customs, and persons authorised by the Board of Trade or Commissioners of Customs in Great Britain, and persons authorised by the governor or customs department in a British possession (s. 356). Passage and subsistence money, damages, compensation, and costs may be recovered summarily by any person entitled thereto, or the officers mentioned above in their behalf (s. 357).

All persons throughout British dominions and jurisdiction executing the provisions of the Act (except those relating to passenger steamers only) are protected by the Public Authorities Protection Act, 1893 (56 & 57 Vic. c. 61).

(7) *Generally*.—In the absence of any agreement to the contrary, the owner of a ship is responsible (as between himself and the other persons made liable by the Act) for any default in complying with the foregoing requirements; and the owner is liable to any person who, being so made liable, pays money to or on behalf of a steerage passenger (s. 359). Forms are prescribed by statute for the master's bond, passengers' list, governor's or consul's certificate of expenditure on wrecked or forwarded passengers, passage broker's bond and licence, notices to the Board of Trade by licensing authorities and applicants for passage broker's licence, and by a Court forfeiting a licence, appointment of passage broker, agent and emigrant runner's annual licence (Sched. 14 of the Act). The fees for survey of emigrant ships are fixed by the Board of Trade, not exceeding those fixed by the Act (Sched. 9); and any person employed to do a statutory duty receiving any fee other than under the direction of the Board of Trade, incurs a liability of a fine of £50 (s. 360). Abstracts of the contents of these statutory provisions prepared by the Board of Trade are supplied by the chief officer of customs at the port of clearance to the master of every emigrant ship going from the British Islands to any British possession; and copies thereof must be posted in emigrant ships going from the British Islands to any British possession, and the master must produce a copy thereof to every steerage passenger who demands it, under penalty of a fine (s. 361). A harbour authority having control of docks and basins whence emigrant ships are despatched, may make by-laws with regard to the landing and embarkation of emigrants, with a fine for breach thereof, and power to arrest an offender by their officers or servants or constables, and detain him till he can be brought before a justice for summary trial (s. 362). A foreign passenger steamer or emigrant ship, in regard to which a foreign certificate of survey, attested by a British consul at a place out of the Queen's dominions, is produced, and the Board of Trade are thereby satisfied that the ship has been officially surveyed and has complied substantially with the Act's requirements, may be exempted from further survey, and granted a certificate as if given upon survey; but this provision may, by Order in Council, be ordered not to apply in the case of an official survey at any port where corresponding advantages are not extended to British ships (s. 363).

The foregoing provisions (except ss. 336–338 above, applying to emigrant voyages to the British Islands) apply to all emigrant ships making voyages from the British Islands to any port out of Europe and not within the Mediterranean Sea; and to every ship carrying steerage passengers on a colonial voyage, except those provisions relating to (a) master's bonds; (b) steerage passenger contract tickets; (c) Order in Council regulating emigration from the British Islands, or prescribing

rules for promoting health, cleanliness, order, or ventilation; (*d*) passage brokers; (*e*) emigrant runners; (*f*) posting abstracts and producing copies thereof. Where the length of a colonial voyage is less than three weeks (see s. 289), the provisions as to (*a*) regulations as to the accommodation for steerage passengers, (*b*) medical practitioner, stewards, cooks, cooking apparatus, and efficient crew, and (*c*) maintenance of steerage passengers after arrival, do not apply; and in the same case the enactments as to the issue of provisions, except as to water, do not apply to any steerage passenger who has contracted to furnish his own provisions (s. 365). Governors of British possessions may by proclamation determine the length of a voyage for a ship carrying steerage passengers thence to any other port, and fix the dietary scales and the medical stores which are necessary for the steerage passengers during the voyage; and such proclamation has effect without as well as within such possessions. They may also authorise a survey of emigrant ships sailing from such possessions as is made by two surveyors in the case of emigrant ships sailing from the British Islands, and any competent person to act as medical practitioner on board an emigrant ship going a colonial voyage (s. 366). The governors of the Australian colonies may by proclamation determine the number and mode of carriage of steerage passengers to be carried in any emigrant ship proceeding from one such colony to another. Special power is given to governors of British possessions to allow ships going thence within the Tropics with Asiatic or African steerage passengers to depart from the limitations of the Act as regards passenger space; and such limitations do not apply in the case of ships going from any port in the island of Ceylon to any port in British India in the Gulf of Manar, or Palk's Straits, the number of passengers in which is subject to regulation by the Legislature of Ceylon (s. 367). These provisions of the Act, except those relating to passenger steamers only, do not apply to British India, but may be made applicable there by the Legislature of India, with Her Majesty's consent (s. 368).

Excise licences may be obtained for the sale of exciseable liquors on board certain passenger ships. An Act of 1828 provides that the master or commander of any packet boat or other vessel employed for the carriage and conveyance of passengers from one part of the United Kingdom to another, or other parts thereof, or any other person nominated and approved of by the owner or owners, director or directors, of such boat, etc., signified by their subscribing a certificate or declaration to be delivered by them to the Commissioners or Assistant Commissioners of Excise of that part of the United Kingdom where they reside, may be granted a licence by the Commissioners or any officer of theirs (1834, 4 & 5 Will. IV. c. 75) to sell exciseable liquors during the voyage to the passengers on board; such licence is transferable, and must be renewed yearly; and the duty on it is £1, 1s. (1840, 3 Vict. c. 17), and is under the management of the Excise, goes to the Consolidated Fund; and the penalty for selling exciseable liquors on board such a vessel without a licence is £10 (9 Geo. IV. c. 4), saved by Licensing Act, 1872 (35 & 36 Vict. c. 94, s. 72). See Bell's *Excise Laws*.

[*Authorities*.—Abbott, *Merchant Shipping*; Temperley, *Merchant Shipping Act*.]

Passing.—As to the date of the passing of an Act of Parliament, see ACT OF PARLIAMENT; ASSENT (ROYAL) (see also *Hall v. L. B. & S. C. Rwy. Co.*, 1886, 17 Q. B. D. 230; *Ex parte Rashleigh, In re Dalzell*, 1875,

2 Ch. D. 9). The passing of an Act is quite a different thing from its commencement or coming into operation (*Hall v. L. B. & S. C. Rwy. Co., supra*). When an Act is expressed to come into operation on a specified day, that is to be construed as commencing on the expiration of the previous day (Interpretation Act, 1889, 52 & 53 Vict. c. 63, s. 36 (2); *Tomlinson v. Bullock*, 1879, 4 Q. B. D. 230).

With reference to the phrase "in any action commenced after the passing of this Act," the question has been raised whether that does not refer to the coming into operation of the Act. The answer would seem to be in the negative (*Ings v. L. & S.-W. Rwy. Co.*, 1868, L. R. 4 C. P. 17; *Wood v. Hunt*, 1867, quoted at L. R. 4 C. P. 18 *n.* 2), unless the context shows a different intention on the part of the Legislature (*Wood v. Riley*, 1867, L. R. 3 C. P. 26).

As to the phrase "passing upon a highway" in the Highway Act, 1835, 5 & 6 Will. iv. c. 50, s. 78, that is not limited to carriages or vehicles actually in motion, but will also refer to such as have been left by their drivers standing by the roadside (*Phythian v. Baxendale*, [1895] 1 Q. B. 768). "Passing" therefore in that case means while on the way or journey. Compare the phrase "passing over the same portion of the line" in the Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, s. 90. See further, **PASSING TICKET**.

The phrase "passing" is also used in matters of practice with reference to the decisions of juries, who are said to *pass* upon the issues submitted to them. So also judgment is said to *pass* for a plaintiff.

As to the "passing" of the property in goods on sale, see **SALE OF GOODS**.

Passing of Property.—See **DELIVERY**; **SALE OF GOODS**.

Passing (of Statute).—See **ACT OF PARLIAMENT**.

Passing Ticket—A note or check which the toll-clerks on some canals give to the boatmen, specifying the lading for which they have paid toll.

Passive Debt.—Under this term fall to be included all sums of which one is actual debtor, as distinguished from active debts, which are incurred with a view to furnishing assets whereby passive debts may be paid. On the latter interest will invariably be payable, whereas on passive debts, by agreement, express or implied, between debtor and creditor, no interest will, as a rule, be due.

Passive Trust.—See **TRUSTS**.

Passport—A sea brief, sea letter or pass, granted by the supreme authority of a nation in time of war, declaring that a ship sails under the authority of such nation. With the flag, it is the principal proof of neutrality (*The Success*, 1 Dod. 132; *The Vrow Elizabeth*, 5 Rob. C. 4;

Vegetentia, 1 Rob. C. 1; *The Vreede Sholtys*, 5 Rob. C. 5; see Abbott, *Merchant Shipping*, 12th ed., p. 296 n.).

The more familiar sense of the term is that of a document delivered by the Foreign Office, or under its authority, requesting foreign Governments to afford aid and protection to the holder. Such passports are granted to all persons either known to the Secretary of State or recommended to him by some person who is known to him; or upon the application of any banking firm established in London or in any part of the United Kingdom; or upon the production of a certificate of identity signed by any mayor, magistrate, justice of the peace, minister of religion, physician, surgeon, solicitor, or notary resident in the United Kingdom. In certain cases the applicant's certificate of birth must be produced, in addition to the certificate of identity.

There are some special rules as regards naturalised British subjects, who, if resident in London or in the suburbs, must *inter alia* apply personally for their passports at the Foreign Office.

Persons abroad applying for a passport should address themselves to the nearest British mission or consulate. A passport cannot be issued abroad to a colonial naturalised British subject, except for a direct journey to the United Kingdom or to the colony where he has been naturalised.

British subjects are now free to enter Belgium, France, Holland, Italy, Denmark, Sweden, and Norway without passports (*Foreign Office List*, 1897).

In diplomacy, when a diplomatic agent demands or receives his passport, it is a mark of displeasure, and generally the first step in a rupture.

Past Debt.—A debt which is in existence prior to some independent legal act relating thereto is so called to distinguish it from an "existing debt," that is, a fresh advance made at the time. The phrase is of some importance in two connections—(1) as to the satisfaction of a past debt by a legacy given to the creditor; and (2) as to the avoidance, on bankruptcy, of fraudulent securities for past debts. The general rule is that the law will not favour the doctrine of satisfaction in the case of past debts, whereas, on the other hand, equity will lean against double portions (*In re Horlock, Calham v. Smith*, [1895] 1 Ch. 516; *Lady Thynne v. Earl of Glengall*, 1848, 2 H. L. 131, 151). At the same time, a past debt will be held to be satisfied by a legacy in a will subsequently made, where an intention on the part of the testator that the legacy should be in satisfaction can be made out, which will, as a rule, be the case when it is of equal or greater amount than the debt (*In re Horlock, Calham v. Smith, supra*; *Plunkett v. Lewis*, 1844, 3 Hare, 316; *Tolson v. Collins*, 1799, 4 Ves. 483); but not when it is of a lesser amount than the debt, or where the legacy is contingent, or where no time is fixed for payment of the legacy (*Crichton v. Crichton*, [1895] 2 Ch. 853; *In re Horlock, Calham v. Smith, supra*; *In re Dowse, Dowse v. Glass*, 1881, 50 L. J. Ch. 285; *Tolson v. Collins, supra*; *Graham v. Graham*, 1749, 1 Ves. 262; *Cranmer's case*, 1701, 2 Salk. 508).

In bankruptcy the main question will always be as to the *bona fide* nature of the transaction having reference to the past debt, and such transaction may be upheld so long as it is not a mere cloak or scheme for obtaining some benefit, as, for example, to get preferential payment of the past debt (*Ex parte Johnson, In re Chapman*, 1884, 26 Ch. D. 338; *Ex parte Harauwell, In re Hemingway*, 1883, 23 Ch. D. 626; *Ex parte Wilkinson, In re Berry*,

1882, 22 Ch. D. 788; *Ex parte Sheen, In re Winstanley*, 1876, 1 Ch. D. 5; *Ex parte Winder, In re Winstanley*, 1875, 1 Ch. D. 290). And see B OF SALE, vol. ii. at p. 132.

Pastoral Lease — A lease of Crown lands in the Austral Colonies granted under the provisions of Colonial Acts. Every leasehold is called a "run." In the case of a lease granted under New South Wales Crown Lands Act of 1884, it has been held that the reserved therein is in all cases to be computed and be payable from the date of the notification in the *Gazette* under sec. 76, by which runholder becomes entitled to a pastoral lease of the run (*Reid v. Gar*: 1889, 14 App. Cas. 94).

Pasture and Pasturage.—The strips of waste land between an enclosure and a highway are presumed to belong to the owner of the enclosure, who has a right of action against anyone depasturing cattle thereon, or otherwise using them for any purpose other than the right of passage (*Stevens v. Whistler*, 1809, 11 East, 51; *Harrison v. Duke of Rutland* [1893] 1 Q. B. 142; and see HIGHWAYS). But notwithstanding his possession of the right of pasturage on the land at the side of the highway, the owner of cattle may be convicted, under sec. 25 of the Highway Act, 1864 (28 Vict. c. 101), if he suffers them to stray on the road (*Golding v. Stocker*, *Freestone v. Casswell*, 1869, L. R. 4 Q. B. 516, 519). A sole right of pasturage differs from one of sole herbage or pasture in that it gives only the right to its possessor's cattle to eat the grass, not the right to cut it, and therefore does not carry the right to the underwood (see *Co. Litt.* 4 b, and *Hopkins v. Robinson*, 1671, 1 Mod. 74). But an admission on a Court roll to pasture in wood, and underwood may be sufficient to pass the lands (*Doe v. Bevis*, 1877, 7 C. B. 456); and as to what is a holding, "let to be used for pasture within the Land Cons. (Ireland) Act, 1881, see *Westropp v. Elligott*, 1889, 9 App. Cas. 215. A grant of all a man's pastures passes the land with it of his own pastures, and his rights of pasture over the lands of others (*Co. Litt.* 4 b). See also COMMON.

Patent Agents.—By the Patents, etc., Act, 1888, it is provided (s. 1) that after the 1st July 1889 no person shall be entitled to describe himself as a patent agent (*i.e.* one who acts in the obtaining of patents in the United Kingdom), whether by advertisement, description on his place of business, or otherwise, unless he is registered as a patent agent in pursuance of the Act. The Board of Trade is empowered by the same Act to make, from time to time, such general rules as are necessary to give effect to this provision of the law; and in June 1889 rules were accordingly issued whereby the Board of Trade intrusted the Institute of Patent Agents with the care of the Register of Patent Agents, and the duty of carrying out necessary examinations for entrance to the profession of a patent agent; rules were reissued in 1891. But the Act preserves the right of registration to every person who, to the satisfaction of the Board of Trade, shows that he had been *bona fide* practising as a patent agent before the date of the passing of the Act. The rules made by the Board of Trade must be laid before Parliament, and may be annulled by either House of Parliament at any time within forty days of the time when they are laid before it (1889, s.

1883, s. 101). If neither House rejects them, the Court cannot inquire into whether or not they are *ultra vires* or reasonable (see *Institute of Patent Agents v. Lockwood*, [1894] App. Cas. 347). The rule which requires patent agents to pay an annual fee is *intra vires* (s. c.). A penalty not exceeding £20 can be recovered on summary conviction against one who, not being a patent agent, knowingly describes himself as such (1889, s. 1 (4)); and an injunction cannot be obtained in civil proceedings (case last quoted). The Institute of Patent Agents was incorporated under the Companies Act, 1862, the word "limited" being dispensed with pursuant to licence of the Board of Trade. A charter of incorporation has since been obtained. The Fellows of the Institute are entitled to call themselves Chartered Patent Agents. Communications between a patent agent and his client are not privileged from production in course of an action (*Moseley v. Victoria Rubber Co.*, 1886, 55 L. T. N. S. 482).

Patent Ambiguity.—See AMBIGUITY.

Patent Medicines.—See MEDICINE STAMPS.

Patents; Patents for Inventions.

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PRELIMINARY.

The meaning and effect of "letters patent" in general have already been discussed (see LETTERS PATENT), but the importance of letters patent for inventions makes it necessary to deal with them separately. Letters patent for inventions are grants made by the Crown to a subject, enabling the grantee to prevent all persons other than himself and those whom he authorises, from making, using, exercising, or vending that which is the subject-matter of the letters patent; in other words, letters patent are grants of a form of trade monopolies. The term "monopoly" is not often in use, probably owing to the odium which attached to the term due to the oppressive grants of the Tudors; the grant is much more

frequently styled "a patent," and will be designated by that term in this article.

I. HISTORICAL.

(a) *At Common Law*.—The history of patent law does not date mer from the Statute of Monopolies, as is sometimes stated. The chief aim that statute—which was passed in consequence of events which need be stated in this place—was to declare the common law as understood the sixteenth century lawyers, and to make provision for the due enforcement of that law. Prior to the passing of that statute, the Crown claim the right to grant monopoly patents, and to a certain extent this right is fully recognised by the Common Law Courts. The limit put upon royal prerogative was founded on the common law principle that the prerogative, being a part of the common law, could be exercised only according to the rules of the common law, and could not be exercised in a manner oppressive to the subject; and inasmuch as contracts in restraint of trade were always odious to the common law, trade monopolies could be granted only when the Crown's grant ensured public benefits, which would outweigh the evil of restraint of trade. From the decisions of the Courts prior to the Statute of Monopolies—*e.g.* *Matthey's* case (knives), *Hastin's* case (frisadoes), *Humphrey's* case (sieve for melting lead), and especially *Darcy v. Allin* (playing cards)—the common law on the subject of monopolies is discoverable. From *Darcy v. Allin*—the case of monopolies (N 178; and 11 Co. Rep. 84)—we gather that the common law is as follows: A patent is invalid unless (a) it is novel within the realm, and (b) relates to a new trade or manufacture or engine tending to the furtherance of a new trade, and (c) is granted to the inventor or importer of the thing or process patented; and the patent is bad if it extends to the sole right to sell articles in common use, or to prevent the exercise of a known occupation, also if it be prejudicial in other ways to the commonwealth; further, the length of time during which the monopolies are to exist must not be unreasonable.

(b) *Statute of Monopolies*, 21 Jac. I. c. 3.—This statute contains four clauses, several of which are now but of historic interest. The chief provisions which at the present day are of living interest are the following: (1) That which declares illegal all monopolies, etc., of or for the sole buying, selling, making, working, or using anything within the realm (ss. 1, 2); (2) that which excepts from the above "letters patent and grants of privilege for the term of fourteen years or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm to true and first inventor and inventors of such manufactures, which others at the time of making such letters patent and grant shall not use, so as also they be not contrary to the law, nor mischievous to the state by raising prices of commodities at home, or hurt of trade, or generally inconvenient: the said four years to be accomplished from the date of the first letters patent or grants of such privileges hereafter to be made, but that the same shall be of such force as they should be if this Act had never been made, and of none other" (s. 6); (3) that which enacts that monopoly patents are to be tried according to the common law of the realm (s. 2); and (4) that which gives a statutory right to treble damages to persons "hindered, grieved, disturbed, or disquieted by occasion or pretext of any monopoly or letters patent" (s. 4).

The Statute of Monopolies—which is in the main but declaratory of the common law—is still in force; and sec. 6 (italicised above), in which will be observed the law is declared in terms similar to those employed

Darcy v. Allin (*supra*), is the foundation on which the judges have gradually built up our patent law. The only matters of cardinal importance since 1624, other than legal decisions interpreting the Statute of Monopolies, are the introduction of the specification and the passing of the various Patent Acts regulating the procedure by which patents are obtained. These are referred to below.

II. REQUISITES OF A GOOD PATENT.

The Statute of Monopolies, it will be observed, authorised the grant of a monopoly for a limited time if the subject-matter of the grant be (a) a manner of manufacture, and (b) novel within the realm; judicial decisions, based on other words of the section, have added as requisites of good subject-matter, (c) a quality styled "utility," and (d) in some cases an amount of ingenuity. The statute requires that the patentee should be the "true and first inventor." It will be convenient to deal with these requisites separately.

(a) "*Any Manner of Manufacture*."—It is not every novelty which can be patented. An invention may consist of a new method of calculating, it may be a new tale; it may be a painting; yet its author cannot, under the Statute of Monopolies, or under the Patents Acts, get protection against infringement. It may be stated broadly that a manufacture within the statute consisted of anything which can be handled, or any process of making that which can be handled; or, in other words, an industrial, vendible article, or a means of making an industrial, vendible article. But the proposition, broad as it is, may be insufficient to include everything which may be the subject-matter of a patent. For instance, it is now recognised that a patent may be granted for a new application of an old thing, if only the new application lies so much out of the track of the old application as to require the exercise of ingenuity to have discovered it (see per Lindley, L.J., in *Gadd v. Mayor of Manchester*, 1892, 9 R. P. C. 516). The description of that which is considered a manufacture, as stated above, may suffice if it be extended to include a means of improving a vendible article. Or, as it was put in *Crane v. Price*, 1842, 1 Web. P. C. at p. 409, if the result produced is either a new article, or a better article or a cheaper article than that produced before, the invention is one which may be the subject-matter of a patent. See on this subject Edmunds on *Patents*, ed. 1897, pp. 19 *et seq.*; Hindmarch, pp. 81 *et seq.*; and see also Lord Kenyon in *Hornblower v. Boulton*, 1799, 8 T. R. 99; Abbott, C.J., in *R. v. Wheeler*, 1819, 2 Barn. & Ald. at p. 349; see also *Forsyth v. Riviere*, 1819, 1 Web. P. C. 97, where an application of known detonating powder to the discharge of known firearms was held patentable; and *The Electric Telegraph Co. v. Brett*, 1851, 10 C. B. 838, where a new method of giving duplicate signals at intermediate stations was held to be subject-matter for a patent. Of course the monopoly consists of the right of making, exercising, using, and vending that which is the subject-matter of the patent; it does not give a proprietary right to every article made according to or under the specification.

A mere principle or a discovery of a natural law is not patentable, e.g. a mere enunciation of the chemical truth that pure sulphides will absorb the sulphur compounds cannot be the subject-matter of letters patent (*Patterson v. Gas Light and Coke Co.*, 1876, 2 Ch. D. 812). Nor, generally speaking, will a patent for every process of making a given article be valid (per Alderson, B., in *Neilson v. Harford*, 1841, 1 Web. P. C. 331; and see *Nobel's Explosives Co. v. Anderson*, 1894, 11 R. C. P. 519). But a

principle, coupled with a method of putting it in practice, is good subject-matter (see per Jessel, M. R., in *Otto v. Linford*, 1881, 41 L. T. 39).

At one time there seemed some little doubt whether a *process* could be patented, but whatever difficulty there ever was on this head has long been finally disposed of, and processes, whether chemical or otherwise, are clearly patentable if they satisfy the qualities of novelty and utility (see Edmunds on *Patents*, pp. 24 *et seq.*).

Whether or not a *product* is patentable is still a moot point; but, *semi* there is no objection to the grant of a patent for a novel, useful product. Cotton, L.J., and Bowen, L.J., in *Vorwerk v. Evans*, 1890, 7 R. P. C. 2; and Lord Halsbury in *Riekmann v. Thierry*, 1897, 14 R. P. C. 1, expressed the view that a product could be patented as such; Kekewich, J., in *Vorwerk v. Evans* (*supra*) took an opposite view, and he is supported by some of the dicta in *Nobel's Explosives Co. v. Anderson* (*supra*). The reasons for believing that the affirmative view is correct are to be found in Edmunds on *Patents*, pp. 29 *et seq.* A patent may be granted for an addition or improvement, as was decided in *Boulton v. Bull*, 1795, 2 Black. 489, a decision which has been followed on many subsequent occasions notwithstanding that it runs counter to the opinion of Coke and to *Birch* case, 15 Eliz. 3 *Inst.* 184. Even a slight improvement, if novel and not colourable, would be patentable; thus mere change of size in one element of an article may suffice (see *Edison v. Woodhouse*, 1887, 4 R. P. C. 79, 92). On the other hand, the mere substitution of a pivot for a hinge in a machine for punching nails has been held not to be good subject-matter for a patent (*Horsenail Co. v. Swedish Horsenail Co.*, 1889, 6 R. P. C. 1). But the patent cannot be granted for the machine when the invention consists only in the improvement or addition to the machine; want of novelty would be a bar to such a patent. And if an improvement or addition is made to a thing already patented, the patent for the improvement, though good, will not entitle its patentee to make use of that to which it is an improvement. The latter patent cannot be in derogation of the former, and if the latter patentee desires to use his improvement with the thing to which it is an improvement, he must get permission from the earlier patentee, or await the lapse of the earlier patent.

Is a patent for a new use of a known contrivance sustainable? A clear answer to this question was at one time not easily obtained, but the decisions of the last thirty years have made the law much clearer. In *Harwood Great Northern Ry. Co.*, 1865, 11 H. L. 654, it was decided that the mere application of an old contrivance in an old way to an analogous subject, without any novelty or invention in the mode of applying the old contrivance to the new purpose, is not a valid subject-matter of a patent. But if there be invention in "the application or the mode of application" the patent will—if not invalid on other grounds—be impregnable against attack (see per Bowen, L.J., in *Elias v. Gravesend Tin Plate Co.*, 1890, 7 R. P. C. 455). The law, as at present understood, has been summed up in a few words by Lindley, L.J., in the course of his judgment in *Gadd v. Mayor Manchester*, 1892, 9 R. P. C. 516; he says: (1) A patent for the mere use of a known contrivance without any additional ingenuity in overcoming its first difficulties, is bad, and cannot be supported. If the new use involves no ingenuity, but is in manner and purpose analogous to the old use, although not quite the same, there is no manner of new manufacture within the Statute of James. But (2) a patent for a new use of a known contrivance is good, and can be supported if the new use involves practical difficulties which the patentee has been the first to see and overcome.

by some ingenuity of his own. An improved thing produced by a new and ingenious application of a known contrivance to an old thing, is a manner of manufacture within the meaning of the statute. In this connection compare the facts proved in *Gadd v. Mayor of Manchester* with those of *Longbottom v. Shaw*, 1891, 8 R. P. C. 333.

(b) *Novelty*.—"If the public once become possessed of an invention by any means whatever, no subsequent patent can be granted for it, either to the true and first inventor himself, or to any other person; for the public cannot be deprived of the right to use the invention, and a patentee of the invention could not give any consideration to the public for the grant, the public already possessing everything that he could give": so said Lord Blackburn in *Patterson v. The Gas Light and Coke Co.*, 1875, 3 App. Cas. p. 244, quoting and adopting the statement in Hindmarch. Not only must an invention be new; if it is to be patentable, it must be new in every distinct part for which the patentee claims a monopoly; for if one of such parts be old, the patent will, subject to the right of disclaimer (see *post*), be entirely invalid (see *Hill v. Thompson*, 1818, 8 Taun. p. 401; and for other authorities, see Edmunds on *Patents*, 2nd ed., p. 46, note y). Whether or not an alleged invention is or is not novel is a question of fact, to be determined after the Court has determined the legal construction of the document describing the invention, *i.e.* the specification (see per Lord Westbury in *Hills v. Evans*, 1862, 31 L. J. Ch. 457).

The invention may be one which the patentee imported from abroad, and yet may have the incident of novelty, for, be it observed, all that is requisite is that it shall be new "within this realm," *i.e.* within Great Britain, Ireland, and the Isle of Man. See, *e.g.*, *Brown v. Annandale*, 1842, 1 Web. P. C. 433, in which it was decided that prior user in England is fatal to the validity of a Scotch patent; and *Rolls v. Issacs*, 1881, 19 Ch. D. 268, in which prior publication in Natal was held to be no bar to the grant of patent rights for an invention unknown in England.

An invention may be wanting in novelty, because (1) it has been anticipated by something identical with, or only colourably differing from it; or because (2) though it has not been identically produced before, yet the information at the disposal of the world at large may suffice to show that obviously the patentee has produced nothing new. Patents have been invalidated on the former of these grounds when evidence has been produced showing that the alleged invention differs from a prior one only by the substitution of a known equivalent for something in the earlier invention, *e.g.* the substitution in a machine of a hinge for a slide (*Fletcher v. Arden*, 1888, 5 R. P. C. 46). An allegation of want of novelty based on the state of public knowledge is proved, though there be no actual anticipation, if the evidence of experts, standard treatises, lectures by specialists, or other evidence show that a certain number of those interested in the trade or science with which the invention is connected are in possession of such information as will negative any exercise of the inventive power on the part of the inventor. See remarks of Jessel, M. R., in *Plumpton v. Malcolmson*, 1876, 3 Ch. D. p. 566. But, if a mosaic of extracts from books is necessary to prove want of novelty, the presumption is in favour of the invention as subject-matter for a patent (*Von Heyden v. Neustadt*, 1880, 14 Ch. D. 230); for, though the books may contain all the information necessary, yet the piecing this together may, of itself, constitute a novelty. In truth, it is submitted, the difference between the objection of want of novelty and want of invention (or, as it is sometimes termed, want of

subject-matter—as to which see below) here reaches the vanishing point. But this will be referred to hereafter.

It is necessary in drawing particulars of objections to distinguish between want of novelty based on a prior specific invention, and want of novelty based on the state of general knowledge; each form of objection should be separately stated, and the particulars under the latter need much less precise than under the former (*Phillips v. Ival Cycle Co.*, 1897 R. P. C. 77; *Holliday v. Heppenstall*, 1889, 41 Ch. D. 109).

If the thing or process covered by the invention has been published (a) prior user, or (b) in books or documents, or (c) to individuals not bound to secrecy, the invention cannot validly be patented, whether the patent or intending patentee did or did not know of the prior publication. In this respect all these forms of publication are alike. But there are some points on which they differ. These we must deal with shortly.

Prior user means user in public, not necessarily by the public. Therefore, while neither a secret user (*In re Dollond's Patent*, 1776, 1 Web. P. C. 4 *Betts v. Menzies*, 1857–62, 1 El. & El. 990, 1008) nor a confidential user (*Morgan v. Seaward*, 1837, 2 Mee. & W. 544; *Bentley v. Fleming*, 1844 Car. & Kir. 587) will invalidate a patent obtained subsequent to the user in public, though it be not proved that any of the public appreciated or knew of the invention, will be fatal. Thus the existence of a special made lock on a gate where the public might have seen it (*Carpenter Smith*, 1841, 9 Mee. & W. 300), a pavement laid down without secrecy on the porch of a private house (*Stead v. Williams*, 1843, 2 Web. P. C. 121, 136), an improved tricycle ridden on the public road (*Brereton v. Richards*, 1884, 1 R. P. C. 165), the use of machinery in public on pier-erection work (*In re Adamson's Patent*, 1856, 6 De G., M. & G. 420), the deposit of articles in a warehouse for the purpose of sales which, in fact, did not take place (*Mullins v. Hart*, 1852, 3 Car. & Kir. 297), have all been held sufficient prior user to make invalid patents subsequently obtained for the inventions disclosed. Experimental user discontinued as useless will not usually be “prior user” sufficient to be a bar to the novelty of a later invention.

Publication in books and documents is on a somewhat different footing. For whereas user in public is sufficient prior publication to make impossible a subsequent patent for the invention used, publication in books, etc., will not be a bar to novelty, unless the invention thereby becomes actually part of public knowledge (Tindal, C.J., in *Stead v. Williams*, 1843, 2 Web. P. C. 143). A paper publication is no bar unless the facts are such that it is a fair inference that the invention has become known to a number of people (see per Jessel, M. R., in *Plimpton v. Spiller*, 1877, 6 Ch. D. 412). This is entirely a question of fact. Thus in the *Plimpton* cases (1876–1877, 3 Ch. D. 351; 6 Ch. D. 412) it was held that a book placed in the Patent Office Library, but not in such a manner as to be accessible to the public, was not a publication. But in *Harris v. Rothwell*, 1887, 35 Ch. D. 416, a book placed in the same library was held to constitute a publication, though it was not proved that any particular member of the public saw it. A prior specification may be an anticipation, even though it be a provisional specification (*Lawrence v. Perry*, 1885, 2 R. P. C. 179).

In dealing with paper anticipations, the Court will act upon the rule that in order to invalidate a subsequent patent, an antecedent statement in prior publication must be such that a person of ordinary knowledge of the subject would at once perceive, understand, and be able practically to apply it, without making experiments or seeking for further information (*Hills v. Evans*, 1862, 4 De G., F. & J. 289; *Lyon v. Goddard*, 1893–1894, 10 R. P.

334; 11 R. P. C. 354; *Ehrlich v. Ihlec*, 1888, 5 R. P. C. 206, 207). Or the point may be stated thus: Can an intelligent mechanic, accustomed to the kind of thing in question, ascertain the invention from reading the alleged prior publication? if yes, the invention has been anticipated (see per Grove, J., in *Philpott v. Hanbury*, 1885, 2 R. P. C. at p. 43, and the cases cited in Edmunds on *Patents*, at pp. 49–51). If the prior publication describes an invention which in practice is unworkable, if it fails to disclose a practicable way of carrying out the object of the discovery, it is no bar to a patent for a practical success, though the object of the earlier and the later invention be the same (*Betts v. Menzies*, 1862, 10 H. L. 117); and in chemical cases in particular, though the prior description may suffice to enable the operator to make the product in the laboratory, it will not be a fatal anticipation of a patent which enables production on a large scale; test-tube production and production as a manufacturer requires it are very different one to the other (see in *Badische, Anilin, etc., Co. v. La Société Chimique des Usines, etc.*, 1897, 14 R. P. C. 876).

Communication to individuals is sufficient to make the invention thus published unpatentable if the person to whom the communication is made is under no obligation to secrecy, or if, being under such obligation, he breaks it (*Patterson v. Gas Light and Coke Co.*, 1878, 3 App. Cas. at p. 245; and see per Fry, L.J., in *Humpherson v. Syer*, 1887, 4 R. P. C. 407). “Is it a fair conclusion from the evidence that some English people, under no obligation to secrecy, arising from confidence or good faith towards the patentee, knew of the invention at the date of the patent?” (case last cited). In accordance with this a gun made in open shop, known to the workmen frequenting the shop (*Westley v. Perkes*, 1893, 10 R. P. C. 181), exhibition of a thing to two customers (*Blank v. Footman*, 1888, 39 Ch. D. 678), production of a sample to a possible buyer (*Winfield v. Snow*, 1891, 8 R. P. C. 15), have been treated as publication.

Publication at exhibitions stands on a different footing by virtue of sec. 39 of the Patents Act, 1883. That section provides that “the exhibition of an invention at an industrial or international exhibition certified as such by the Board of Trade, or the publication of any description of the invention during the period of the holding of the exhibition, or the use of the invention for the purpose of the exhibition in the place where the exhibition is held, or the use of the invention during the period of the holding of the exhibition by any person elsewhere, without the privity or consent of the inventor, shall not prejudice the right of the inventor or his legal personal representative to apply for and obtain provisional protection and a patent in respect of the invention, or the validity of any patent granted on the application, provided that both the following conditions are complied with, viz.: (a) the exhibitor must, before exhibiting the invention, give the Comptroller the prescribed notice of his intention to do so; and (b) the application must be made before or within six months from the date of opening the exhibition.” The Patents, etc., Act, 1886, s. 3, enables the Queen by Order in Council to extend the section just quoted to industrial and international exhibitions held out of the United Kingdom.

Under the provisions of sec. 103 of the Patents Act, 1883, as amended by sec. 6 of the Act of 1885, the Queen may make arrangements with foreign Governments for the mutual protection of inventions. Any person who has applied within any State with which arrangements have been made thereunder for protection for any invention will be entitled to a patent for his invention in this country, provided he makes application here within seven months after his foreign application. Such an applicant is not

prejudiced in his right to a patent by publication within this realm during the said seven months. Sec. 104 of the Patents, etc., Act, 1883, makes similar provision for inventors who have first applied for protection in any British possession. A list of countries and colonies with which arrangements have been made is set out in Edmunds on *Patents*, 2nd ed., at p. 536; the text of the International Convention will be found on p. 723 of the same book.

(c) *Ingenuity*.—In addition to being a manufacture and a novelty, the thing or process to be patented must exhibit what is often styled the quality of being “subject-matter” for a patent. It is argued in Edmunds on *Patents*, pp. 80 *et seq.*, and submitted here, that the term “subject-matter” as used in this sense is misleading and of recent introduction. The requisite is better described as “a certain amount of invention.” There are reasons for saying that at one time “novelty” and “invention” were convertible terms, and that, in so far as they differed, novelty alone was requisite to a good patent (see Edmunds on *Patents*, pp. 83 *et seq.*, and especially pp. 95, 96, where the argument is summarised). Be this as it may, patents cannot now be granted unless the production of the article or process has entailed a certain amount of invention or ingenuity, though it may be that a slight amount will suffice (*Hinks v. Safety Lighting Co.*, 1876, 4 Ch. D. 607; *Hayward v. Hamilton*, 1879, Grif. 115; *Dowling v. Billington*, 1890, 7 R. P. C. 191).

(d) *Utility*.—It has long been decided that “utility” is necessary if the patent is to be supported (see, *e.g.*, per Alderson, B., in *Morgan v. Seaward*, 1837, 1 Web. P. C. 197), and this though the Statute of Monopolies does not in terms refer to utility. But the word as used in patent law does not bear the ordinary meaning attached to it. The true meaning was tersely stated by Charles, J., in *Wilson v. Union Oil Mills*, 1892, 9 R. P. C. at p. 70, when he said that the test of utility is this, Does the invention when put into practice do what it assumes to do? Lindley, L.J., said that utility is relative; “useful for what? is a question which must always be asked, and the answer must be, useful for the purpose indicated by the patentee” (*Lane Fox v. Kensington, etc., Co.*, [1892] 3 Ch. 424). Commercial success, commercial possibilities, are not the test of utility (see cases just quoted), save where the *raison d'être* of the patent is cheaper production (*Halsbury, L.C.*, in *Badische, etc. v. Levinstein*, 1887, 12 App. Cas. 719, 720).

III. THE SPECIFICATION.

The specification is the document in which is stated the nature of the invention and the method of carrying it into effect. Prior to the reign of Anne specifications were not required, but at that time it became usual to make it a condition of the patent grant, that the patentee should enrol an instrument containing a working description of the patented invention. The first instance of this occurred in 1711 (*Nasmyth's Patent*), and the practice soon became hardened. In 1852 a provisional specification was first provided for. Modern specifications usually consist of (a) the title, (b) the provisional specification, (c) the complete specification, including (d) the claims, and (e) the drawings. They are to be seen and obtained at the Patent Office, but not until the complete specification has been accepted; until then they are kept secret (Patents, etc., Act, 1883, s. 10).

(a) *The Title*.—The Patents, etc., Act, 1883, s. 5 (5), enacts that a specification, whether provisional or complete, must commence with the title; and by sec. 6 it is provided that the Comptroller shall refer every application for a patent to an examiner, who shall ascertain and report to

the Comptroller whether the title sufficiently indicates the subject-matter of the invention, and (s. 2 of the Act of 1888) if not, the Comptroller may refuse the application, subject to appeal to the law officer. The absence of a title would not be fatal to the patent (*Siddell v. Vickers*, 1890, 15 App. Cas. 496), if by any means the Comptroller should allow the specification to pass titleless. At one time, when the practice was to enrol the specification subsequent to the grant of the patent, the drafting of the title was a matter to be carefully considered. Nowadays the title is of much less importance; it is useful for purposes of search, and it may be of some assistance towards the interpretation of other parts of the specification. A draftsman has considerable latitude allowed him in settling the title; and if for any reason it is considered that the title is defective or dangerous, the provisions of the Act of 1883, ss. 7 and 9 (if the specification has not been published), or of s. 18 (if it has), may be utilised to correct the error.

(b) *The Provisional Specification*.—Every application for a patent must be accompanied either by a provisional or by a complete specification. If accompanied by a provisional specification, the complete will be due within nine months from the application, or within such extended time, not exceeding one month after the said nine months, as the Comptroller may on payment of the prescribed fee allow (Act of 1883, s. 8; Act of 1885, s. 3). The result of lodging a provisional specification is to leave the door open to improving the details of the invention, whilst securing priority from the date of application; sec. 13 of 1883 provides that every patent shall be dated and sealed as of the day of application, provided that a complete specification is left in time (see above) at the Patent Office, and is accepted (1883, s. 9 (4)). Further, the provisional specification will enable the applicant to use and publish his invention between the date of the application and the date of sealing of the patent, without prejudice to the patent to be granted for the same (1883, s. 14). But no right of action for infringement arises until the publication of the complete specification, and the action cannot be commenced till the patent has been granted (1883, ss. 13, 15).

The province of a provisional specification is to describe generally and fairly the nature of the invention, of which, however, it need not contain a complete and exhaustive description. It must be drawn honestly and in such manner as to make it clear what is the ambit of the invention; that is, it must identify the invention (Byles, J., in *Newall v. Elliott*, 1858, 4 C. B. N. S. 269; Lopes, L.J., in *Woodward v. Sansum*, 1887, 4 R. P. C. 166; and see the remarks of Smith, L.J., in *Cassel Gold Extracting Co. v. The Cyanide Gold Recovery Syndicate Ltd.*, 1895, 12 R. P. C. at p. 257, in the course of which he points out that a patentee does not insert claims in the provisional, nor state how he carries out the invention).

A patent will be invalid if the complete specification comprehends a substantially different invention to that which the provisional specification covers. This defect, known as disconformity or nonconformity, will suffice to protect the defendant in an action for infringement, or will enable a petitioner to obtain the revocation of the patent (per Halsbury, L.C., in *Siddell v. Vickers*, 1890, 15 App. Cas. 496). And this is so, notwithstanding the Act of 1883, s. 9 (S. C.; and see *Nuttall v. Hargreaves*, [1892] 1 Ch. 23). This enacts that the two specifications shall be referred to an examiner to determine (*inter alia*) whether the invention particularly described in the complete specification is substantially the same as that which is described in the provisional; and if they disconform, acceptance of the complete specification may be refused, unless it be amended.

Disconformity is not generally a ground of opposition to the sealing of patent (see *infra*).

Whether or not the provisional and the complete conform one to other is a question of fact, when the true construction of the document is once obtained, the leaning on this point of the Court being to construe the documents in favour of, rather than against, the validity of a patent (Lindley, L.J., in *Gadd v. Mayor of Manchester*, 1892, 9 R. P. 516, 527). The question to be answered is this, Does the invention described in the complete so differ in nature or extent from that described in the provisional as to be, or include, substantially a distinct invention? An affirmative answer to this is fatal to the patent. But there is nothing objectionable in the development of the invention within the limits foreshadowed by the provisional; indeed, if a patentee, when he files a complete, has a development or improvement which is not *per se* a separate invention, he not only may but ought to disclose it, provided that, in the colour of an improved means of carrying out the old, he may not introduce a new invention (*Gadd v. Mayor of Manchester, supra*; Lord Blackburn *Bailey v. Robertson*, 1878, 3 App. Cas. 1055; Bowen, L.J., in *Miller v. Sea Barker, & Co.*, 1893, 10 R. P. C. at p. 111; *Edison v. Woodhouse*, 1832 Ch. D. 520).

(c) *The Complete Specification*.—It has already been stated that a complete specification must be left at the Patent Office within a certain time (*supra*); it may be left at the time of application for a patent, in which case the absence of the provisional avoids all risk of disconformity, or it may be left afterwards, in which case the applicant obtains further time in which to develop his invention. In either case it must particularly describe and ascertain the nature of the invention, and in what manner this invention is to be performed; it must, if required, be accompanied with drawings; and it must end with a claim, *i.e.* a distinct statement of the invention claimed (1883, s. 5 (4) (5)). (Drawings and claims will be referred to hereafter.) The specification is then sent by the Comptroller to an examiner, whose duty it is to report whether the specification is satisfactory in form and conforms to the provisional, and—subject to appeal to the law officer—the Comptroller accepts, requires amendment of, or refuses to accept the specification (1883, ss. 6, 7, 9). (Amendment will be dealt with hereafter.) The specification must be accepted within twelve months of the application—with a possible extension of three months (1888, s. —otherwise the matter lapses (1883, s. 9 (4)). If accepted, the acceptance is advertised, and the application and specification become open to public inspection (1883, s. 10). The effect of acceptance is to give the applicant the like privileges and rights as if a patent for the invention had been sealed on the date of acceptance, with these limitations, that the protection ceases if the date of sealing the patent passes and the patent is not sealed, and the applicant may not sue for infringement until the patent has been actually granted to him (1883, s. 15).

But even after the complete specification has been accepted, it is liable to be called in question in actions for infringement or on petitions for revocation of the patent, and if it prove insufficient the patent will be void, and no amount of *bona fides* in the drafting will avail to save the patent (*Simpson v. Holliday*, 1864, Hig. Dig. 443). If the patent be granted for two inventions, and the specification as regards either be insufficient, the patent will be void as regards both (*Morgan v. Seaward*, 1837, 1 Web. P. 173; *Simpson v. Holliday*, 1866, 13 W. R. 578) until amendment. Sufficiency or insufficiency is a question of fact; a specification is sufficient only if

discloses clearly and intelligibly the nature of the invention, and a workable method of carrying it out in practice. No hard and fast rules can be laid down; if the patentee has given such a description as will enable a competent workman, conversant with the trade, who brings his mind and knowledge to bear on the matter, to carry out the invention, the specification is good. But if those accustomed to the manufacture to which the invention relates, would need to make further experiment, or to obtain information other than that which they are given in the specification or with which they should in ordinary course be acquainted, then the specification is bad (see *Miller v. Searle, Barker, & Co.*, 1893, 10 R. P. C. 106, 111; *Plimpton v. Malcolmson*, 1875, 3 Ch. D. 531, 568; *Edison v. Holland*, 1889, 6 R. P. C. at pp. 279, 280, 282; *Simpson v. Holliday*, 1865, 13 W. R. 578).

The following have been specially decided to be fatal: (1) Want of *bona fides* in drawing the specification; (2) vagueness and ambiguity—thus the generic term “fossil salt” was used, when but one species of fossil salt would do, and the specification was held to be bad (*Turner v. Winter*, 1787, 1 T. R. 602); (3) misleading into the belief that a given process or given materials will carry out the invention, when in fact they will not, though this be done innocently (*Simpson v. Holliday*, 1866, L. R. 1 H. L. 315); (4) not disclosing the best and cheapest method of carrying the invention into effect known to the patentee at the date of framing the specification; and if the patentee does not disclose the method he himself adopts, he is liable to have the patent upset (*Plimpton v. Malcolmson*, *supra*; *Wood v. Zimmer*, 1815, 1 Web. P. C. 82); hence he must disclose all improvements, provided they are within the ambit of the invention as adumbrated by the provisional (*supra*). It is also said—especially with regard to patents for improvements—that the old and the new parts must be distinguished one from the other; but this must be taken with some limitations, for if the invention be a combination it will be assumed that the patentee alleges the combination as a whole to be new (*Foxwell v. Bostock*, 1864, 4 De G., J. & S. 298; *Harrison v. Anderston Foundry Co.*, 1876, 1 App. Cas. 574; *Moore v. Bennett*, 1884, 1 R. P. C. 129). And if it be common knowledge that a part of that described in the specification is old, it is needless that the old should be specified. Indeed, in view of the claim, which is now an invariable part of a specification, there seems no longer any need to distinguish expressly between the new and the old.

(d) *The Claims.*—At the end of the complete specification the draftsman states concisely exactly what it is that the patentee claims to have invented. He is not limited to a single claim; he may set forth as many claims as the specification will support, but if any one be bad, the patent as a whole is void. Formerly claims were unnecessary, but by the Act of 1883 (s. 5 (5)) it is provided that the complete specification “must end with a distinct claim.” It used to be said that a claim is a disclaimer, a cutting down of the generality of the specification; query if this is so any longer (see per Lord Herschell in *Parkinson v. Simon*, 1895, 12 R. P. C. at p. 406), the claim must state in “distinct” terms what it is that the patentee does claim. Nevertheless, the absence of a claim is no bar to the validity of a patent; though the Comptroller would not accept a specification without a claim (*Vickers v. Siddell*, 1890, 15 App. Cas. 496). This does not mean that the officials of the Patent Office in any way control the wording of the claim or accept any responsibility for it; it is their duty only to see if the claim is there, and is formally in order. A claim must not go beyond the invention, nor may it lay claim to that which is old, or not subject-

matter of a patent. A claim should be construed in its ordinary grammatical meaning, but if there be an ambiguity, that reading should be adopted which will make it valid and reasonable (see per Lord Davey in *Parkinson v. Simon*, *supra*). If there be several claims, a distinct meaning should, if possible, be given to each (S. C.); and in arriving at the meaning, the specification as a whole may and should be regarded, especially when the claim is to something "substantially as described" (Lindley, L.J., in *Edison v. Woodhouse*, 1887, 4 R. P. C. 79; *Parkinson v. Simon*, *supra*). In a specification relating to an improvement, the novelty must be pointed out in the claim; but if the subject-matter be a combination, this is not necessary, as the claim will be construed to be to the combination as a whole (see cases *supra*). If, in addition to the combination, the parts of which it is made up are new, and are intended to be covered individually by the patent, they must be specifically claimed (see *Clarke v. Adie*, 1875, 2 App. Cas. at p. 321, and cases quoted in Edmunds on *Patents*, 189, 190). If the subordinate integers of the combination are claimed, and it is made clear that the patentee desires protection for them *qua* integers, the patent extends to them, and if one of them be invalid, the patent as a whole will fail. But if the integers are "appendant," *i.e.* are introduced, not to stand alone, but as part of the main invention to which they are ancillary, then the patent does not protect them apart from the combination, nor is the patentee at the risk of supporting their validity one by one (*British Dynamite Co. v. Krebs*, 1879, 13 R. P. C. 190; *Pneumatic Tyre Co. v. Caswell*, 1897, 13 R. P. C. 164).

(e) *Drawings*.—Both provisional and complete specifications may be required to be accompanied with drawings, but if the former is thus illustrated, the latter may refer back to it (1883, s. 5 (3) and (4); 1886, s. 2); drawings may be dispensed with (Patent Rules, 1890, r. 30). Drawings are part of the specification, and may be used to explain the letterpress, though not to alter its meaning if this be clear (*Clarke v. Adie*, 1877, 2 App. Cas. 315; *Stewart v. Bell's Trustee*, 1883, 11 Ct. Sess. Cas. 4th series, 236).

(f) *The Interpretation of a Specification*.—At one time it was the habit of the Court to construe specifications very strictly against the patentee, and again, later, to apply what was termed a benevolent construction to them; apparently the opinions of the judges for the time being on the policy of allowing monopolies was the guiding factor. But the modern judges act on a more regular plan. Perhaps the present attitude of mind is best described as a judicial anxiety to support a really useful invention, if it can be supported upon a fair and reasonable construction of the patent; but in every case to construe the specification without doing violence to the meaning of the words and figures actually employed (Jessel, M. R., in *Hinks v. Safety Lighting Co.*, 1876, 4 Ch. D. at p. 612). Perhaps even this states the case too favourably to the specification, for whilst over-nicety of criticism will not be encouraged, and whilst particular words will not be so construed as to defeat the clear intention of the whole,—for the specification must be construed as a whole, regard being had to the title, claims, drawings, and all,—the document will be construed by the canons of construction applied to every written instrument which has to be interpreted (see INTERPRETATION) by the Court (see per Esher, M. R., in *Edison-Bell Phonograph Corporation v. Smith*, 1894, 11 R. P. C. 389; and in *Noble's Explosives Co. v. Anderson*, 1894, 11 R. P. C. 519; and per Lord Halsbury in *Parkinson v. Simon*, 1895, 12 R. P. C. 403). Where a specification is ambiguous, the Court will, if possible, give a meaning to it which will

support the patent (Lord Davey in *Parkinson v. Simon*, *supra*), but if the meaning is clear, the absurdity of that meaning will not lead the Court to place another meaning on the words employed (*Cropper v. Smith*, 1884, 1 R. P. C. at p. 237). In construing a specification, the Court may hear evidence on such points as the state of knowledge at the date of the framing of the specification, the meaning of technical terms, the meaning which persons for whose use the document is intended would put upon the various expressions and terms employed; but the Court will not consider the interpretation which witnesses put on the document, even though these witnesses be experts (see, *e.g.*, *Hills v. Evans*, 1863, 4 De G., F. & G. 288; and especially the remarks of Smith, L.J., in *Gadd v. Mayor of Manchester*, 1892, 9 R. P. C. at p. 532).

(g) *Amendment of the Specification*.—Formerly the power of allowing amendments rested either with the Lord Chancellor or with the Master of the Rolls, and, indeed, the Master of the Rolls still seems to have power to amend clerical errors in specifications (per Brett, M. R., in *In re Gare*, 1884, 26 Ch. D. 105). Later legislation gave increased facilities, and now the law governing amendments is to be found in secs. 7, 9, 18–21 of the Patents, etc., Act, 1883, as amended by the Act of 1888. The procedure relating to amendments varies according as to whether the specification has or has not at the time when amendment is desired become public property, *i.e.* (*semble*) been accepted by the Comptroller (see Edmunds on *Patents*, p. 219).

Prior to such acceptance, amendment may be required by the Comptroller if the examiner, to whom the application or specification has been referred pursuant to the Act, reports that the documents have not been prepared in the prescribed manner, or that the title does not sufficiently indicate the subject-matter of the invention, or that the invention, as described in the complete, is substantially different from that set forth in the provisional (1883, ss. 7 and 9). The Comptroller must exercise his discretion, and is not bound by the report of the examiner (*In re C's Application*, 1891, 7 R. P. C. 250). The applicant may appeal to the law officer from the decision of the Comptroller (1883, ss. 7, 9). The hearing before the Comptroller under secs. 7 and 9 is not public, and no advertisements of the date thereof are given, nor is any amendment fee chargeable. There seems to be no means whereby the applicant himself can demand amendment of his specification at this stage, but practically no difficulty should arise, for the applicant might point out anything wrong to the Comptroller, and this officer could and generally would require the desired amendment (*In re Dart's Patent*, Grif. 307).

After a specification has become public property, sec. 18 of the Act of 1883 applies. This provides that (1) a request for amendment may be made from time to time by an applicant or patentee, in writing left at the Patent Office; (2) the request for leave to amend is to be advertised in the official journal; (3) any person may give notice of opposition within one month of the appearance of the advertisement; (4) the Comptroller is then to give notice of opposition to the applicant, and is to hear the applicant and opponent; (5) whether there be, or be not, opposition, the Comptroller is to decide whether, and subject to what conditions, if any, the amendment is to be allowed, but his decision is subject to appeal to the law officer. Sec. 21 of the same Act provides that every amendment shall be advertised in the prescribed manner, *i.e.* in the official journal. The person for the time being entitled to the benefit of a patent (1883, s. 46), including an assignee, may apply; co-owners should all join in the application; a mortgagee or a mortgagor (*semble*) may not

apply without notice to the other (*Van Gelder, etc. v. Sowerby Bridge Fl Co.*, 1890, 7 R. P. C. 208; and cp. *In re Church's Patent*, 1887, 3 R. P. 95). Anybody may oppose before the Comptroller; only those "entitled to be heard in opposition" will be allowed to oppose before the law officer (1883, s. 18 (2) and (4); and *In re Bell*, 1887, Grif. A. P. C. 11). The procedure to be adopted under the sections quoted above will be found in the Patent Rules, 52 *et seq.*, which, it will be observed, prescribe that necessary facts shall be proved by statutory declaration (see *Edmunds Patents*, pp. 700 *et seq.*). The Comptroller has no power to give costs; the law officer has (1883, s. 38; and *In re Pietschmann*, 1884, Grif. 314).

Amendments are permissible by way of "disclaimer, correction, explanation" (1883, s. 18 (1)), but if made pending an action for infringement or proceedings for revocation, amendment by way of disclaimer is alone allowed (1883, s. 19). In no case can the Comptroller or the law officer allow an amendment which would make the specification amended claim an invention substantially larger than, or different from that claimed by the unamended specification (1883, s. 18 (8)); but when the law officer has allowed an amendment it is too late to question the right to make it, save in cases of fraud, for the amendment is conclusive, and shall "in all Courts and for all purposes" be deemed part of original specification (1883, s. 18 (9); *Moser v. Marsden*, 1896, 13 R. P. C. 24). The retrospective effect is well exhibited in the case of *Peck v. Hindes Limit*, 1898, 67 L. J. Q. B. 272. No prohibition will lie against the law officer on the ground that he has improperly allowed an amendment (*In re Van Gelder's Patent*, 1889, 6 R. P. C. 22). Amendment may be allowed on certain conditions, but in view of sec. 20 of the Act of 1883 conditions are generally unnecessary; that section provides that no damages shall be given in any action in respect of the use of the invention before the amendment was made, unless the patentee establishes to the satisfaction of the Court that his original claim was framed in good faith and with reasonable skill and knowledge. Ordinary grounds of amendment are to restrict or abandon some of the claims, to remove an ambiguity, to enable the patentee to make his specification what he originally intended it to be.

If an action for infringement or proceedings for revocation are pending, leave to apply for power to amend must be obtained from the Court or judge, and this tribunal has a discretion (*In re Armstrong's Patent*, 1897, 13 R. P. C. 747) to give this permission; if permission is given, the procedure is followed out as in ordinary cases (Cave, J., in *In re Hall*, 1888, 21 Q. B. 137). Leave is not required after judgment, even whilst an appeal is pending (*Cropper v. Smith*, 1884, 28 Ch. D. 148). As a rule, terms are imposed as a condition for giving leave to amend, e.g. that the amended specification shall not be used at the trial (*Allen v. Douulton*, 1887, 4 R. P. 377); that costs of the action up to the time of application for leave, and costs of the application, be paid by the patentee; that no relief be given in respect of infringements committed prior to the amendment; and so on.

IV. PROCEDURE FOR OBTAINING A PATENT.

The applicant for a patent must leave at the Patent Office with the proper fee an application in the prescribed form, signed by him and containing a declaration that he is possessed of an invention of which he is the true and first inventor (1883, s. 5 (1) and (2)). Two or more persons may make the application jointly, and the patent will not be invalidated if they prove that some of the joint applicants are not the inventors (1883, s. 4 (2)).

and 1885, s. 5). Any person, whether a British subject or not, may make the application (1883, s. 4), *semble*, unless he be an alien enemy. The applicant may be a body corporate (1883, s. 117), or the legal personal representatives of the inventor, provided application be made within six months of the inventor's decease (1883, s. 34), and if the applicant dies after making the application, the grant may be sealed to his personal representatives at any time within twelve months after the death (1883, s. 12 (3), and Patent Rule 20).

One of the applicants at least must be the "true and first inventor." To say this is not the same as stating that the invention has the merit of novelty; "novelty" is a different issue (*supra*). An applicant is deemed to be the true and first inventor if, assuming there be an invention of a patentable nature, he is the inventor of it (see, *e.g.*, *Thomson v. Macdonald*, 1891, 8 R. P. C. at p. 9). And an importer within the realm of an invention is a true and first inventor, if the thing imported be novel within the realm (*Edgeberry v. Stephens*, 1691, 1 Web. P. C. 35; *Marsden v. Saville Street Co.*, 1878, 3 Ex. D. at p. 205). Questions may arise when one man is assisted by another in arriving at the invention intended to be patented; "it would be difficult to define how far the suggestions of a workman employed in the construction of a machine are to be considered as distinct inventions by him. . . . Each case must depend on its merits. But when we see that the principle and the object of the invention are complete without it, I think it is too much that a suggestion of a workman employed in the course of experiments of something calculated necessarily to carry into effect the conception of the inventor, should render the whole patent void" (Tindal, C.J., in *Allen v. Rawson*, 1845, 1 C. B. 551).

Having made the application, the specification, provisional and complete, must be filed within the time and in the manner stated above, and the matter is then referred to the examiners, who report to the Comptroller, and, if the requirements are satisfied, either originally or after amendment, the application and eventually the complete specification is accepted (1883, ss. 6, 7, 9). If the acceptance does not take place within the proper time, the application is deemed to have been abandoned.

The acceptance of the complete specification having been advertised, at any time within two months those entitled to enter objection to the grant of the patent may give notice at the Patent Office of opposition, and of this opposition the Comptroller will give notice to the applicant, and will hear both the applicant and the opponent. His decision on the matter is subject to appeal to the law officer, whose decision is conclusive (1883, s. 11). Due notice of the grounds of opposition must be given by the opponent, and evidence by statutory declarations in certain cases must, and in all cases may, be filed; the exact procedure to be adopted is prescribed by the Patent Rules 34 *et seq.*). It seems that any person may oppose the grant before the Comptroller; on appeal, the law officer can hear only those in his opinion entitled to be heard (1883, s. 11 (3); *In re Glossop*, 1884, Grif. 285; and see examples in Edmunds on *Patents*, pp. 247-249). The Comptroller does not award costs; the law officer may, and these generally follow the event (*In re Anderton*, 1886, Grif. A. P. C. 25). The grounds of opposition are limited to the following (1883, s. 11; 1888, s. 4):—(1) That the applicant obtained the invention from the person giving opposition or from a person of whom he is the legal personal representative. The evidence to support this would be such as would be required to attack a patent already granted on the allegation that the patentee was not the true and first inventor. (2) That the invention has been patented in this country on an

application of prior date. It is usual to refuse a patent on this ground only if the invention for which a patent is asked is identical with the subject-matter of the preceding patent (see, *e.g.*, per Webster, A.-G., in *In re Stubbs*, 1884, Grif. 298). The opposition may in some cases be overruled on condition that the patentee in his specification adds a general disclaimer or a special reference to the opponent's patent (on this see Edmunds, 258 *et seq.*). (3) That the complete specification describes or claims an invention other than that described in the provisional specification, and that such other invention forms the subject of an application made by the opponent in the interval between the leaving of the provisional specification and the leaving of the complete specification. Generally, the law officer will not stop a patent in a doubtful case; it is safer to let the patent be sealed and to leave the opponent to take such steps with regard to it as he may think best to test it in open Court.

If there is no opposition, or if the opposition is unsuccessful, the Comptroller causes the patent to be sealed with the seal of the Patent Office, which seal has the same effect as regards the patent as though the Great Seal had been used; the sealing takes place as soon as may be, and relates back to the date of application for the patent (1883, ss. 12 and 13). The grant is then recorded in a book kept at the Patent Office, styled the Register of Patents, wherein the names and addresses of patentees are entered (1883, s. 23). The Comptroller may refuse to grant a patent for an invention of which the use would, in his opinion, be contrary to law or morality (1883, s. 86).

V. THE GRANT.

The grant of the patent is made by the Crown (see LETTERS PATENT). The patent is personal property but not a chattel (*Steers v. Rogers*, [1893] App. Cas. at p. 235), is assignable, and on the grantee's bankruptcy devolves on his trustee. In practice it is possible to get execution against the patent under a *fi. fa.*, but whether the sheriff is justified in law in taking it does not seem clear. A form of patent is set out in the 1st schedule to the Act of 1883, but the use of that form is not compulsory, and, indeed, there are many occasions when it would be inapplicable (1883, s. 33).

Extent of the Grant.—The monopoly granted extends over the United Kingdom and the Isle of Man, and certain rights in foreign countries are obtainable under the International Convention referred to above (1883, s. 16). It lasts for fourteen years from the date of application for the patent (1883, ss. 13, 17), but if the application was made under the section providing for international and colonial arrangements, the fourteen years date from the application in the foreign country or colony. If the requisite fees are not paid within the prescribed (1883, s. 17) or enlarged (*ibid.*) time, the patent rights will cease, save in very exceptional circumstances, when Parliament may pass a bill confirming the patentee in his rights. The duration of the grant may be extended on the recommendation of the Judicial Committee of the Privy Council, under the provision of sec. 25 of the Act of 1883, and according to the procedure mapped out by the Privy Council Rules, 1897 (see *Law Journal*, vol. xxxii. p. 626). Stated shortly, it is provided that a patentee—*i.e.* any person entitled for the time being to the benefit of a patent—may petition the Judicial Committee for extension of the monopoly, on the ground that he has not received proper remuneration for his invention. But the petition must be presented at least six months before the time limited for the expiration of the patent, and must be advertised three times in the *London Gazette*, the petition being presented within one week after

the appearance of the last of these advertisements. Any person may give notice of opposition to the prolongation, and will be heard on complying with the rules, one of which requires particulars of the grounds of objection to be supplied by the objector. The Attorney-General or other Crown representative will be heard, and need give neither notice of opposition nor particulars of objection. The extension, if granted, will be for some period not exceeding seven years, save in the exceptional cases, when it may amount to fourteen years. Instead of an extension of the old patent, the Crown may grant a new one, with special restrictions and conditions annexed. It follows from the definition of the term "patentee" that an assignee may petition for prolongation, and there are many instances in which such a petition has been granted, but no extension will be granted to an assignee unless the inventor would directly or indirectly obtain an advantage from it, and the circumstances are such that the original patentee himself would, had he petitioned, have been successful (*In re Bower—Barff Patent*, [1895] App. Cas. 675); and if the original patentee has sold his right to an assignee for a price in itself an ample remuneration for his invention, the assignee's right to prolongation is gone (*In re Hopkinson's Patent*, [1897] App. Cas. 249). An extension is not a matter of course; the committee must consider the nature and merits of the invention in relation to the public, the profits made by the patentee as such, and all the surrounding circumstances, and the petitioner must state fully and fairly the facts of the case, and must supply full and unreserved accounts; failure to do this is generally fatal to an extension (*In re Pitman's Patent*, 1871, L. R. 4 P. C. 84). Amongst reasons for granting an extension may be mentioned: that the invention is meritorious, but one which could not in the nature of things come into immediate use; that its advantages were not readily appreciated at the outset, but are being fully recognised at the date of the petition; that the cost of bringing it before the public was large, but that the value of the invention to the public warranted the expenditure. Amongst reasons for refusing an extension are: that the merit is small, that the extension would be to the interest of foreign and injurious to home traders, that the patentee has been negligent in pushing the invention (and see *In re Pieper*, 1895, 12 R. P. C. 292; *In re Semet and Solvay*, [1895] App. Cas. 78).

Rights conferred by the Grant, and Infringement thereof.—The rights conferred are best learned by a perusal of the words of the patent, which give the sole use, exercise, and benefit of the invention to the patentee, and orders that others, either directly or indirectly, shall not "make use of or put in practice the said invention or any part of the same, nor in anywise imitate the same, nor make or cause to be made any addition thereto or subtraction therefrom whereby to pretend themselves the inventors thereof," without leave of the patentee. This entitles the patentee to the sole right to make, use, sell, or even expose for sale (*Oxley v. Holden*, 1860, 8 C. B. N. S. 666). Indeed, in some cases mere possession of an article made according to a patented process may be an actionable infringement, especially if under such circumstances as to raise a presumption that it is intended to be used (*Adair v. Young*, 1879, 12 Ch. D. 13; *United Telephone Co. v. London and Globe Telephone Co.*, 1884, 1 R. P. C. 117). User for instruction, or experimental user, may be actionable (*United Telephone Co. v. Sharples*, 1885, 29 Ch. D. 164), but not necessarily so (*Frearson v. Loe*, 1878, 9 Ch. D. at pp. 66, 67). An innocent sale of articles themselves not the subject-matter of a patent, but which can be combined and are intended by the purchaser to be combined so as to amount to an infringement, is not itself

an infringement (*Savage v. Brindle*, 1896, 13 R. P. C. 266); nor is it always so if the vendor of the component parts knows the purpose for which they will be used (*Townsend v. Haworth*, 1875, 12 Ch. D. 831; *Sykes v. Haworth*, *ibid.* 826); but the Court will not allow the patent to be infringed by a subterfuge assisted by this state of the law (*United Telephone Co. v. Dale*, 25 Ch. D. 778). If the patent be infringed, the infringer cannot allege ignorance of the patent, nor *bona fides*, nor want of intention to infringe (*Stead v. Anderson*, 1847, 2 Web. P. C. 151; *Nobel's Explosives Co. v. Jones*, 1882, 8 App. Cas. at p. 11); conversely, an intention to infringe, which, in fact, proves no infringement, will not render the defendant liable in damages (*Newall v. Elliott*, 1864, 10 Jur. N. S. 954). Nor is it necessary to liability for infringement that the infringing act was not committed by the person accused but by somebody on his behalf, for a master or principal is liable in this respect for the act of his servant or agent; thus directors have been held liable for the infringements of their subordinates done in ordinary course of business, though in contravention of general orders (*Betts v. De Vitre*, 1868, 3 Ch. 429).

Even the Crown may not infringe a patent granted since the Act of 1883 came into force, but its officers administering any department may, by themselves, their agents, and contractors obtain the right to use the patented invention on terms to be agreed or, if this cannot be, settled by the Treasury (1883, s. 27). As regards patents granted prior to 1884, see *Dixon v. London Small Arms Co.*, 1875, 1 App. Cas. 632. As regards the use of inventions on foreign ships navigated in British waters, see 1883, s. 43. If an article is sold by the patentee or by one holding as licensee under him, the sale confers upon the purchaser the right to use without restriction the article actually sold, and to resell with similar liberty to the sub-purchaser; and though the licensee had but limited rights of sale which he has exceeded, the purchaser may use the article, unless he had at the time of sale knowledge of the limitation (*Société Anonyme de Glaces v. Tilghmann's Sand Blast Co.*, 1883, 25 Ch. D. 1; *Incandescent Gas Co. v. Cantelo*, 1895, 12 R. P. C. 262).

Whether or not an infringement has been committed is a point of fact, the question which has to be answered being, has the defendant taken substantially the invention claimed by the patentee? Of course, validity must be assumed, for there can be no infringement of an invalid patent. Taking the substance of an invention will be none the less an infringement because colourable variations have been made, or known mechanical or chemical equivalents employed (see, *e.g.*, *Dudgeon v. Thomson*, 1877, per Cairns, L.C., 3 App. Cas. at p. 34; *Shoe Machinery Co. v. Cutlan*, 1895, 12 R.P.C. 342; *Proctor v. Bennis*, 1887, 36 Ch. D. 740; *Incandescent Gas Light Co. v. De Mare, etc., Light System*, 1896, 13 R. P. C. 301, 559). But before the question of equivalents can arise, the conclusion must be arrived at that in fact the inventions are identical, for if two people solve a problem in substantially different ways, neither method is an infringement of the other, though there may be many well-known contrivances common to both (see, *e.g.*, *Ticket-Punch Register Co. v. Colley's Patents*, 1895, 12 R. P. C. 171, especially the judgment of Lindley, L.J.).

Where an invention consists of something not known before (*i.e.* a "master" or "pioneer" patent), the Court looks very jealously upon any other alleged invention for effecting the same object, and will carefully see whether, in fact, it is not a mere contrivance to evade the master patent. But where there is no novelty in the result, and the claim is only for improvement in or addition to that which is already known, the patentee is

tied down somewhat strictly to the invention he claims and the mode in which he carries out his improvements; it is, however, merely a matter of degree. This, it is believed, is the doctrine to be found in the two leading cases (*Curtis v. Platt*, 1863, 3 Ch. D. 135 *n.* in the H. L. 35 L. J. Ch. 852; and *Proctor v. Bennis*, 1887, 36 Ch. D. 740).

Whether the use of an invention for one purpose will be an infringement of a patent for the same invention granted for another use may be said to be an open point (see on this the cases quoted in Edmunds on *Patents*, p. 328; and *cp. Wright, J.*, in *Maxim-Nordenfelt Gun, etc., Co. v. Anderson*, 1897, 14 R. P. C. 371).

Co-Owners of the Grant.—Each co-owner can enjoy his rights to the full extent without the concurrence of the others; he can assign his shares, sue for an infringement, license others to use the patent, and all without accounting to the other owners for profits made thereby (*Mathers v. Green*, 1866, 1 Ch. 29, approved in *Steers v. Rogers*, [1893] App. Cas. 232).

Assignment of the Grant.—By its terms a patent grant is assignable, and this is recognised by several sections of the Patent Act of 1883. Secs. 23 and 87 provide that notifications of assignment shall be entered in the Register of Patents; sec. 36 enacts that a patentee may assign his patent for any place in or part of the United Kingdom or Isle of Man as effectually as if the patent were originally granted to extend to that place or part only; and sec. 87 provides that the registered proprietor shall, subject to any rights appearing from the register to be vested in any other person, have power absolutely to assign the patent. An assignment may be made by way of mortgage (*e.g. in Steers v. Rogers, supra*). If it is desired to convey a legal interest in the patent, the assignment should be under seal (see *In re Casey's Patents*, [1892] 1 Ch. 104). The want of a seal will be no bar to an equitable assignment, but such an assignment will not enable the assignee to sue for infringement in his own name, and he may be ousted by a legal assignment to one who takes *bonâ fide* and without notice of his equitable rights (see Edmunds on *Patents*, 287, 288, 289). The right to patents not yet obtained may be equitably assigned for value, and it may properly be registered at the Patent Office (*In re Casey's Patents, supra*). The chief contents of an ordinary agreement to assign are stated in Edmunds on *Patents*, pp. 290 *et seq.*, and of an assignment itself, pp. 294 *et seq.*

Licences under a Grant.—A licence to work the invention may be granted by the patentee; for this the wording of the patent is sufficient authority. The effect of the licence is to authorise the person licensed to work the invention without regard to the prohibitory part of the patent, provided that he observes the terms of the licence. But it does not authorise him to sue for infringement, and in this respect his position is far different to that of an assignee (*Heap v. Hartley*, 1888, 42 Ch. D. 461, 470). A licence may be partial as to time or as to area; it may be exclusive or non-exclusive; an exclusive licence confers leave to work the invention, coupled with an agreement not to allow or give similar leave to others than the licensee (*Fry, L.J.*, in *Heap v. Hartley, supra*). A licence pure and simple is not a grant (*S. C.*), and *primâ facie* is revocable by the grantor at any time; but the wording of the licence and the agreements entered into by the parties may take away the right to revoke, and a licence, the consideration for which was a lump sum, is *primâ facie* irrevocable at will (*Guyot v. Thompson*, [1894] 3 Ch. 388). A sale of goods under a licence authorises the purchaser to use or resell the goods; and, even though the licence be partial as to space, the purchaser may use or resell the goods anywhere, provided he had no notice of the restriction at the time of sale (*Société Anonyme de Glaces v. Tilghmann's*

Sand Blast Co., 1883, 25 Ch. D. at p. 7; *Thomas v. Hunt*, 1864, 7 C. B. N. 183). A licensee is usually estopped during the continuance of the licence from denying the validity of the patent (*Mills v. Carson*, 1892, 10 R. P. C. 9). A licence is not assignable without leave of the licensor, unless by the terms of the licence it was otherwise agreed (*Bower v. Hodges*, 1853, 2 L. J. C. P. 194). The principal matters to be considered in drawing licences will be found stated in the chapter on "Assignments and Licences" by M. D. M. Kerly in Edmunds on *Patents*, pp. 300 *et seq.*

VI. PROCEEDINGS RELATIVE TO PATENTS.

(a) *The Action of Infringement*.—This is the action by which the patentee protects his rights. The procedure, so far as it is common to other actions, will not be dealt with here, those points alone being dealt with which are peculiar to patent actions. The Statute of Monopolies, sec. 2, provides that all questions affecting the validity of letters patent shall be tried, heard, and determined according to the common laws of the realm; but since the Judicature Act the various Divisions of the High Court have co-ordinate jurisdiction. The action may be tried in the Palatine Court of Lancaster (53 & 54 Vict. c. 23); it cannot be tried in the County Court (*R. v. County Court Judge of Halifax*, [1891] 2 Q. B. 263).

Particulars.—It is unnecessary to refer to the pleadings; they are governed by the Orders of the Supreme Court. Sec. 29 of the Act of 1883 provides that the plaintiff must deliver with his statement of claim, or by order of the Court or the judge at any subsequent time, particulars of the breaches complained of. The defendant must deliver with his defence, or by order of the Court or a judge at any subsequent time, particulars of any objections on which he relies; if he disputes the validity of the patent, he must deliver particulars of the grounds on which he denies the validity. No evidence can be given at the trial without leave in support of breaches or objections not given in the particulars. Many cases have been decided on this section; suffice it to say here: (a) Particulars of breaches must be such as to give defendant full and fair notice of the case to be made against him, and he is entitled to know by reference to page and lines of the specification exactly what are the breaches complained of (see cases in Edmunds 393–395). (b) Particulars of objection must depend upon the defence about to be raised; thus, a defence of anticipation must be supported by particulars of the nature, the time and place of the prior publications or users alleged (s. 29); the state of public knowledge need not be supported by detailed particulars (*Holliday v. Heppenstall*, 1889, 41 Ch. D. 109). Particulars of disconformity are required, if this is relied on (*Boyd v. Horrocks*, 1886, R. P. C. 285); so also of ambiguity or insufficient description in the specification (*Crompton v. Anglo-American Brush Electric Co.*, 1887, 37 Ch. D. 283). Particulars, whether of breaches or of objections, may from time to time be amended by leave of the Court or a judge (1883, s. 29 (5)); but a defendant who desires to amend his objections is generally, though not always, put on terms to allow the plaintiff to discontinue the action, and if the option is exercised, to be paid by the defendant all costs incurred since the original particulars of objection were delivered (*Edison Telephone Co. v. India-Rubber Co.*, 1881, 17 Ch. D. 137; *Wooley v. Broad*, [1892] 2 Q. B. 317). The power to give leave to amend is discretionary (*Cropper v. Smith*, 1884, 26 Ch. D. 700); the Court of Appeal may exercise it (*Shoe Machinery Co. v. Cutlan*, 1895, 1 R. P. C. 530). On taxation of costs regard is to be had to the particulars delivered by each party, and they will not be allowed costs in respect of any particulars not certified by the Court or a judge to have been proven or to

have been reasonable and proper (1883, s. 29 (6)), a certificate which can be given by the Court below, the Court of Appeal, or the House of Lords (*Cole v. Saqui*, 1889, 40 Ch. D. 132; *Morris v. Young*, 1895, 12 R. P. C. at p. 465). This certificate cannot be granted unless the materials before the Court are such that an opinion on the particulars can be formed, and it will not go into a case or a part of it merely to enable it to certify as to the particulars (*Longbottom v. Shaw*, 1889, 43 Ch. D. 46); the difficulty presses much when an action is discontinued before the particulars are before the Court (*Middleton v. Bradley*, [1895] 2 Ch. 716).

The Trial.—The action must be tried without a jury, unless the Court shall otherwise direct; but the Court may, and on the request of either of the parties shall, call in an assessor (1883, s. 28). The judge may direct an expert to prepare a special report (*Badische, etc., Co. v. Levinstein*, 1883, 24 Ch. D. 156).

Remedies open to the Patentee.—A patentee who establishes infringement is entitled at his option against the defendant either to damages or to an inquiry and payment over of the profits made by the infringement; but he cannot get both against the same defendant (*De Vitre v. Betts*, 1873, L. R. 6 H. L. 319). In addition the patentee may obtain, in the discretion of the Court, an order that infringing articles may be destroyed, or delivered up to him, or otherwise be so treated as to prevent future infringements (*Betts v. Vitre*, 34 L. J. Ch. 289, 291; *Tangye v. Stott*, 1865, 14 W. R. 386; *Edison-Bell Co. v. Smith*, 1894, 11 R. P. C. 389). Further, the patentee will ordinarily be entitled to an injunction to restrain further infringements, unless the Court is satisfied that the danger of future infringements does not exist (e.g. in *Proctor v. Bayley*, 1889, 42 Ch. D. 390). An injunction may be granted to restrain a threatened infringement, though no actual infringement has taken place (*Frearson v. Loe*, 1878, 9 Ch. D. 48). Sometimes an interlocutory injunction will be granted, viz. when the patent is an old one, and the patentee has been in long and undisturbed possession of it; or where its validity has been established elsewhere; or where the defendant is estopped from denying validity (per Jessel, M. R., in *Dudgeon v. Thomson*, 1877, 30 L. T. N. S. 244). But an interlocutory injunction will be refused if there be substantial ground for doubting the infringement, or if the plaintiff has been guilty of laches, or if the balance of convenience is against making the order. In practice the defendant usually submits to keep an account, and on that the interlocutory injunction is not granted.

Costs.—Generally speaking, the question of costs is dependent upon the discretion of the Court. The costs of particulars are referred to above. In some circumstances the plaintiff is entitled to full costs; sec. 31 of 1883 provides that in an action of infringement the Court may certify that the validity of the patent came in question, and then in any subsequent action for infringement the plaintiff on obtaining a final order or judgment in his favour shall have his full costs, charges, and expenses as between solicitor and client, unless the Court or judge trying the action certifies that he ought not to have the same. When a party is successful on some issues and fails in others, the more common practice in patent actions is to apportion the costs, and frequently no general costs of the action are given (see per Bowen, L.J., in *Badische, etc., Co. v. Levinstein*, 1885, 29 Ch. D. at p. 419).

(b) *Action to restrain Threats*.—A person who alleges that he has a patent may threaten his rivals in trade and do considerable harm. At common law the party who suffers loss by the threat may bring an action for damages, but will be successful only if he can show that the threats are made maliciously (*Wren v. Wield*, 1870, L. R. 4 Q. B. 730; *Halsey v.*

Brotherhood, 1880–81, 15 Ch. D. 514; 19 Ch. D. 386). The Patents Act 1883, provides another remedy; by sec. 32 “where any person claiming to be the patentee of an invention by circular, advertisement, or otherwise threatens any other person with any legal proceedings or liability in respect of any alleged manufacture, use, sale, or purchase of the invention, any person or persons aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage, if any, as may have been sustained thereby, if the alleged manufacture, use, sale, or purchase to which the threats relate was not in fact an infringement of any legal rights of the person making such threats.”

On this section it has been decided that the threats are within the section, and may be actionable though they are not *ejusdem generis* with circulars or advertisements (*Skinner v. Shew*, [1893] 1 Ch. 413, 425). Although mere general threats or warnings are not within the statute, yet threats aimed at future infringements are within it, if in effect they are in respect of something giving rise to a present cause of action (*Challender v. Roy*, 1887, 36 Ch. D. at p. 441). See examples of threats in Edmunds on *Patents*, p. 475. If the threat is actionable, the right to an injunction will follow; damages can be recovered only if substantial injury has been caused (*Duffield, etc., Co. v. Waterloo, etc., Co.*, 1886, 31 Ch. D. 638).

The defences open to the patentee, in addition to a denial of the threats, include that the patent has actually been infringed by the plaintiff in which case what is virtually an action of infringement must be tried. The plaintiff may attack the validity of the defendant's patent (*Kurtz v. Spence*, 1887, 36 Ch. D. 770), and particulars of infringement and of objection must be supplied as though under sec. 29 of the Act of 1883, mentioned above (*Union Electrical Power, etc., Co. v. Electric Power Storage Co.*, 1883, 38 Ch. D. 325).

But the defendant has another defence, for it is provided by the Act that the section “shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent.” The effect of this is, that though the threatener may have no valid patent, yet if he commences and prosecutes an action with due diligence (a question of fact, *Combined Weighing, etc., Co. v. Automatic, etc., Co.*, 1884, 42 Ch. D. 665), he will be entitled to defeat the action brought under this section; provided, that is, that he acts with *bona fides* (*Challender v. Roy*, *supra*). And though the threatener discontinues his action (*Colley v. Har*, 1890, 44 Ch. D. 179), or even if he takes it to trial and is defeated (*Combined Weighing Machine Co. v. Automatic Weighing Machine Co.*, *supra*), he will have brought himself within the protection of the proviso.

(c) *Action under the Statute of Monopolies*.—Sec. 4 of the Statute of Monopolies provides that if any person shall be “hindered, grieved, disturbed, or disquieted . . . by occasion or pretext of any monopoly or of any letters patent . . . then and in every such case the same person or persons shall and may have his and their remedy for the same at common law by any action or actions to be grounded upon this statute,” and shall recover “three times so much damages which he or they sustained by means or occasion of being so hindered,” etc. How far this right of action still remains, and at what in modern times it can be said to aim, is not yet satisfactorily settled; but it has been suggested that, *inter alia*, it may be utilised against even a *bona fide* threatener whose patent is, in fact, invalid (see Gordon on *Monopolies by Patents*). The only case which has hitherto been brought under this section is *Peck v. Hindes Limited*, 1898, 67 L. J. Q.

272, where Mathew, J., held that the section in question does not apply to patents purporting to be granted under sec. 6 of the same statute. He further decided that as the defendant threatener's patent in the case before him had been made good by amendment, it must, in view of the Act of 1883, s. 18 (9), be treated as though it had been originally a valid patent.

(d) *Proceedings for Revocation of a Patent*.—A petition for revocation of a patent may be presented to the Court by (a) the Attorney-General, or (b) any person authorised by the Attorney-General, or (c) any person alleging that the patent was obtained in fraud of his rights (*i.e.* with the dishonest intention of depriving him of his rights, *In re Avery's Patent*, 1886, 36 Ch. D. at p. 324), or of the rights of any person under or through whom he claims, or (d) any person alleging that he, or any person through whom he claims, was the true inventor of any invention included in the claim of the patentee, or (e) any person alleging that he, or any person under or through whom he claims an interest in any trade, business, or manufacture, had publicly manufactured, used, or sold, within this realm before the date of the patent, anything claimed by the patentee as his invention (1883, s. 26). If the petitioner has *locus standi* to present the petition, the grounds on which he may ask for revocation are any of those upon which a patent might under the old practice have been repealed by *sci. fa.* (see under LETTERS PATENT)—now abolished as regards monopoly patents (1883, s. 26)—or which would be a defence to an action of infringement (*In re Morgan's Patent*, 1887, 5 R. P. C. 186; *In re Dege's Patent*, 1895, 12 R. P. C. 448). And though the petitioner has already attacked the validity of the patent on identical grounds in an infringement action, neither patentee nor petitioner will be estopped by the former trial from rebutting or supporting the same objections (*In re Deeley's Patent*, [1895] 1 Ch. 687). The petition proceeds according to the procedure prescribed for actions, and it is expressly provided by sec. 26 of the Act of 1883 that the petitioner shall deliver particulars of objection. At the hearing the patentee is entitled to begin (1883, s. 26 (7)). If an order for revocation is made, the person in whose favour it is made must cause an office copy of the order to be left at the Patent Office, and the purport of it will then be entered on the register (Patent Rule 74); for the practice as to cancellation, now apparently obsolete, see *In re Armstrong's Patent*, 1897, 14 R. P. C. at p. 755. If the patent may be made good by amendment of the specification—for which leave of the Court is required if the proceedings are pending (1883, s. 19)—the Court should not at once revoke the patent, but should give a limited time within which, if the amendment be made, the patent, with the amended specification, shall stand good (*In re Deeley's Patent*, [1896] App. Cas. 496). Where a patent has been revoked on the ground of fraud, the Comptroller may, on the due application of the true inventor, grant him a patent in lieu thereof, and bearing the same date as the date of revocation of the patent so revoked (1886, s. 26 (8)).

VII. MISCELLANEOUS MATTERS.

The Patent Register.—This is kept at the Patent Office, and contains the names and addresses of granters of patents, and notifications of assignments, transmissions by death or otherwise, licences, amendments, extensions, revocations; it is *prima facie* evidence of the matters contained in it (1883, ss. 23, 87). Notice of trusts, whether express, implied, and constructive, may not be entered on it (1883, s. 85). It is open to inspection, and certified copies may be obtained, subject to conditions (1883, s. 88). The Court may rectify the register, on the application of any party aggrieved, by

the omission without sufficient cause of the name of any person or other particulars, or by any entry made without sufficient cause (1883, s. 90 1888, s. 23).

Compulsory Licences.—The Board of Trade may order a patentee to grant licences on such terms as it may think fit, and any such order may be enforced by mandamus. The grounds upon which the Board of Trade may act are set forth in sec. 22 of the Act of 1883.

Inventions in Instruments of Munitions of War.—Facilities are given for the communication of these to the Secretary of State for War, without danger of publication affecting the validity of the patent. If the Secretary of State arranges to acquire the patent granted or to be granted, he may give a certificate, and on this the application, specification, etc., will be kept secret by the Comptroller. For fuller details, see 1883, s. 44.

References.—As to the Patent Offices, see Act of 1883, ss. 82, 83, 84, and Edmunds on *Patents*, ch. iv.; power of the Comptroller as to amending clerical errors, 1883, s. 91; procedure to obtain duplicate patent on loss of the original, 1883, s. 37; offences against the Act, 1883, ss. 93, 105. See PATENT AGENTS.

Confirmation of Patents.—There can now, as above noted, be no confirmation of invalid letters patent except by special Act of Parliament. See *In re Jablockoffs' Patent*, [1891] App. Cas. 294; and see Edmunds on *Patents* pp. 528–532.

[*Authorities.*—Edmunds on *Patents*, 2nd ed., 1897; Terrell on *Letter Patent*, 3rd ed., 1895; Cunningham on *Patents*; Frost on *Patents*; Lawson on *The Patents, etc., Acts*, 2nd ed., 1889; Webster's *Patent Cases*; Hindmarch on *Patents*; Higgins' *Digest of the Law of Patents*; Morris' *Patent Conveyancing*; Robinson on *Patents* (American Law); Gordon on *Monopolies by Patents*.]

Patents of Peerage.—See BARONY; HOUSE OF LORDS LETTERS PATENT; PEERAGE.

Paterna ex parte.—See NEXT-OF-KIN.

Paternity.—See AFFILIATION; BASTARD; LEGITIMACY; POSTHUMOUS CHILD.

Path.—This word corresponds with the Anglo-Saxon *patha*, meaning that on which one goes, and is frequently used in legal instruments in conjunction with other words denoting rights of way, such as “ways,” “passages,” “easements,” etc. (see *Turner v. Crush*, 1878, 4 App. Cas. 221) It would seem that there can be no path without two definite termini; so that wandering at random over an open space will not give any definite right of passage (*Robinson v. Cowpen Local Board*, 1893, 9 R. 858; *Eyre v. New Forest Highway Board*, 1892, 56 J. P. 517). Like other rights of way the user of a path will depend upon some grant, express or implied, the periods of prescription being twenty and forty years for defeasible and absolute rights respectively (2 & 3 Will. IV. (1832) c. 71, s. 2). The extent of the user will therefore have to be determined from the nature of the grant and the intention of the parties as there disclosed (*Cousens v. Rose*, 1871

L. R. 12 Eq. 366; *Watts v. Kelson*, 1870, L. R. 6 Ch. 166), and will not be allowed to be unreasonably increased (*Finch v. Great Western Ry. Co.*, 1879, 5 Ex. D. 254; *Williams v. James*, 1867, L. R. 2 C. P. 577; *Henning v. Burnet*, 1852, 8 Ex. Rep. 187; *Cowling v. Higginson*, 1838, 4 Mee. & W. 245). Whether the user is unreasonable will be a question of fact for a jury (*Hawkins v. Carbines*, 1857, 27 L. J. Ex. 44; *Cowling v. Higginson*, *supra*). If the path is a way of necessity to a close, the grantee can use it to subserve all reasonable purposes for which the close can be used, and is not limited to the purposes in existence at the time of the grant (*Finch v. Great Western Ry. Co.*, *supra*). And if a grantor derogate from his grant by obstructing the path, the grantee can abate the obstruction by deviating over the grantor's land, without being bound in the first instance to raise an action against him to remove the obstruction (*Selby v. Nettlefold*, 1873, L. R. 9 Ch. 111). In conveyances, paths and rights of way will pass under the term "appurtenances" (*Thomas v. Owen*, 1887, 20 Q. B. D. 225), though, if the grantor has used several ways of necessity where one will suffice, the grantee cannot claim all, but will only get such one as the grantor may select (*Bolton v. Bolton*, 1879, 11 Ch. D. 968).

Under the General Inclosure Act, 1845 (8 & 9 Vict. c. 118, s. 68), it was held that paths not set out in an award under the Act were to be deemed extinguished (*Turner v. Crush*, *supra*). And see RAILWAY, *Crossing of Roads*.

Patrimony.—In the civil law, *patrimonium* included everything which was by law capable of being inherited. The Romans, however, also distinguished *res in patrimonio* from *res extra patrimonium*, including under the former term all things capable of being possessed by an individual exclusively of other individuals, and under the latter all things that were not capable of being so possessed.

In English law, likewise, the term "patrimony" is used more properly of hereditary estates or rights descended from ancestors, but also, in a general sense, of any kind of property in possession. Most things are capable of being inherited, but the exceptions are important. Thus the sea, the air, the light of heaven, are common to all, and cannot be made the subject of individual ownership. So likewise are things public, such as the seashore, arms of the sea, ports, harbours, creeks and navigable rivers, highways, roads, bridges, and the like; as also all things belonging to cities and municipal corporations, such as public squares, streets, markets, and the like. But in the stricter sense, the term "patrimony" will be confined to such estates as have descended from ancestor to descendant in the same family, primarily from the father, but also, by extension, from the mother or other ancestors.

The term has also been used to signify a father's natural duty to tend and nurture his children.

Patriotic Fund.—A commission under the Royal Sign Manual was issued, dated the 7th October 1854, for the purpose of raising and distributing a fund to be called the Patriotic Fund, for the relief of the families of men and officers of the army and navy who might fall in the Russo-Turkish War of that time.

In 1867 parts of the fund having been specifically appropriated, there remained a balance, and the Act to make better provision for the adminis-

tration of the fund was passed (30 & 31 Vict. c. 98), for the purpose of defining the objects to which in future the fund should be applied, and providing for its future government.

Various other Acts have since been passed for further carrying out these objects (as well as supplementary commissions issued), being the Patriotic Funds Acts, 1867 to 1886.

Full details as to the operation of the fund may be found in the Report of the Royal Commissioners of the Patriotic Fund, 1897.

Patron; Patronage (Lat. *Patronus; Jus Patronatus*).—The word Patron in Roman law is used in contradistinction to client. In English law it is confined to the owner of ecclesiastical advowsons. It is, however, said that the word *Defensor* would be more correct than that of Patron (Godol. p. 280). Patronage may be in the hands either of laymen or of ecclesiastics. As to origin of system, see ADVOWSON; see further, JU PATRONATUS; PRESENTATION.

Patterns.—See DESIGNS.

Pauper.—See POOR LAW.

Pauper Lunatic.—See ASYLUMS.

Paving.—The paving of streets and footways was begun under a system of local Acts creating paving commissioners, of which Michaelangel Taylor's Act (57 Geo. III. c. 29) is the most important now in force. These have been in the main superseded by the Metropolis Management Act (as to London) and the Public Health and Local Government Acts (as to the rest of England), which have made the local authorities surveyors of highways, and intrusted to them the task of paving streets. These powers are dealt with under TOWN GOVERNMENT.

Pawn; Pawnbroker.

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1. *Definition.*—A pawn or pledge (the names are synonymous) is a bailment of personal property as a security for some debt or other engagement.

(Story on *Bailments*, s. 286); the engagement may be a present or future debt, or any engagement (*ibid.* s. 300), which is lawful (*Taylor v. Chester*, 1869, L. R. 4 Q. B. 309). The names are applied both to the contract and to the property which is the subject of it. The contract of pawn is to be distinguished from a LIEN (*q.v.*), under which there is a mere right to retain possession by way of security, and from a mortgage, in which the whole title in the property mortgaged is conveyed to the mortgagee (subject to the mortgagor's equity of redemption), and upon which possession may or may not be given to him. Thus the pledge of a bill of lading does not make the pledgee liable for freight in respect of the goods (*Sewell v. Burdick*, 1884, 10 App. Cas. 74). Delivery of possession to the pledgee is essential to the contract (see below, 4.).

A. AT THE COMMON LAW.

2. *What may be pledged.*—Besides goods and chattels, choses in action, as debentures (*Donald v. Suckling*, 1866, L. R. 1 Q. B. 585), negotiable instruments (*Simmonds v. London Joint-Stock Bank*, [1892] App. Cas. 201; *Bentinck v. London Joint-Stock Bank*, [1893] 2 Ch. 120), and “any valuable things of a personal nature” (Story, s. 290 and note), may be pledged, provided they are capable of actual or constructive delivery. So also may a limited or partial interest in any such property (see below, 3.).

And the natural increase of the pawn before redemption passes with it (Story, s. 292; see *Webster v. Power*, 1868, L. R. 2 P. C. 69).

3. *The Pledgor's Title.*—In general the pledgee can give no better title than he has himself (*Singer Manufacturing Co. v. Clark*, 1879, 5 Ex. D. 37; *Cheeseman v. Exall*, 1851, 6 Ex. 341), unless he has authority from the true owner. A partner has authority to pledge the goods of the firm for partnership purposes (*Ex parte Bonbonus*, 1803, 8 Ves. 540; Partnership Act, 1890, s. 5). Anyone who is entitled to transfer possession may effectually bind his own interest by pledging the property (*Hoare v. Parker*, 1788, 2 T. R. 376; 1 R. R. 500; see *Donald v. Suckling*, below, 7.).

Before the Factors Acts a factor's lien was lost if he purported to pledge the goods otherwise than as a security to the extent of his lien (see Story, s. 325).

A pledgee can sub-pledge the goods (below, 8.).

As to the statutory power of a person in possession as a “mercantile agent” under the Factors Act, or as a seller or buyer under the Sale of Goods Act, 1893, s. 25, see PRINCIPAL AND AGENT. The true owner may be estopped from setting up his title against the pledgee (see ESTOPPEL, vol. v. p. 74), *e.g.* because he has given the pledgor apparent authority to dispose of the goods (see *Cole v. North-Western Bank*, 1875, L. R. 10 C. P. 354). So where a pledgor obtained the goods back from the pledgee by fraud, and pledged them to a second pledgee, the latter was held to have a good title against the first pledgee (*Babcock v. Lawson*, 1879, 4 Q. B. D. 394; 5 Q. B. D. 284). The holder of negotiable instruments can make a valid pledge of them to any *bona fide* pledgee for value (*Simmonds v. London Joint-Stock Bank*, [1892] App. Cas. 201). If the consignee of a bill of lading pledge the goods to different persons by delivering different copies to them, the first pledgee gets the better title (*Meyerstein v. Barber*, 1866, L. R. 2 C. P. 38, 661; 4 H. L. 317). A power to sell does not involve a power to pledge (*Jonmenjoy v. Watson*, 1884, 9 App. Cas. 561).

There is an implied undertaking by the pledgor that he has a good title to pledge the goods; if he has none, the pledgee may, notwithstanding his own implied undertaking to redeliver to the pledgor, deliver the goods to the true owner (*semble*, *Cheeseman v. Exall*, 1851, 6 Ex. Rep. 341).

4. *Delivery*.—The goods must be delivered to the pledgee in order to complete the pledge (Story, s. 297), but the delivery need not be contemporaneous with the contract (*Hilton v. Tucker*, 1888, 39 Ch. D. 669; Bac. Abr. "Bailment" B.). The delivery may be actual or symbolical (see the judgment of Willes, J., in *Meyerstein v. Barber*, *supra*, 2 C. P. 38; and *ante*, vol. i. pp. 202, 203). Delivery of the key of the room where the goods are locked up (*Hilton v. Tucker*, *supra*), or of documents of title, as a bill of lading (*supra*), or a delivery order on a warehouseman (*Grigg v. National Assurance Co.*, [1891] 3 Ch. 206), or delivery of part in the name of the whole (*Kemp v. Falk*, 1882, 7 App. Cas. 573, per Lord Blackburn, at p. 586), and in the course of delivery of the whole (*Bolton v. London and Yorkshire Ryw. Co.* 1866, L. R. 1 C. P. at p. 440), is sufficient. So also if the pledgor undertakes to hold as bailee for the pledgee (*Reeves v. Capper*, 1838, 5 Bing. N. C. 186; *Martin v. Reid*, 1862, 11 C. B. N. S. 730).

5. *Rights of the Pledgee*.—The contract gives the pledgee a "special property" in the goods (see BAILMENTS, vol. i. p. 452), by virtue of which he is entitled to the exclusive possession during the time, and for the objects for which it is pledged (Story, s. 303). He can sue in trover or detinue for the full value of the goods (*Swire v. Leach*, 1865, 18 C. B. N. S. 479). If the goods are pledged without an actual delivery of the goods themselves, as by delivery of a bill of lading, he can sue for a conversion effected before the pledge (*Bristol, etc., Bank v. Midland Ryw. Co.*, [1891] 2 Q. B. 653). Apart from agreement or custom (see BANKER AND CUSTOMER, vol. i. p. 481), the pledge is security only for the original debt or other engagement only (Story s. 304; *Ex parte Ockenden*, 1754, 1 Atk. at p. 236; cp. the Pawnbrokers Act below, but see *Demainbray v. Metcalf*, 1715, 2 Vern. 691; and *Jones v. Smith* 1794, 2 Ves. Jun. 372, *revd.* in H. L. *ibid.* p. 380), together with the interest and the incidental charges and expenses due in respect of the debt (Story, s. 306), or properly incurred in respect of the property pledged (but see *Somes v. British Empire Shipping Co.*, 1860, 8 H. L. 338, a case of lien).

6. *Use*.—"By the better opinions the pawnbroker shall have a reasonable use of it so that it be without damage to the thing pledged" (Bac. Abr. "Bailment" B.). So the pledgee may milk a cow regularly or ride a horse moderately, when in pledge, by way of compensation for the charge of their maintenance (*ibid.*). He must not expose the pledge to any risk of deterioration, injury, or loss by using it (Story, ss. 329, 330; *Coggs v. Bernard*, per Holt, C.J., 1704, 2 Raym. (Ld.) p. 916).

7. *Sale*.—The pledgee may sell the pledge after the time fixed for payment if any, and before tender of what is due (*Martin v. Reid*, 1862, 11 C. B. N. S. 730; *Johnston v. Stear*, 1863, 15 C. B. N. S. 330; *Pigot v. Cubley*, 1864, *ibid.* 702; *Carter v. Wake*, 1877, 4 Ch. D. 605; *Fraser v. Byas*, 1895, W. N. 112; he has no right of foreclosure (*l.c.*). If no time is fixed for payment, he must demand payment, and give notice of his intention to sell, before selling (Story, s. 308; *Pigot v. Cubley*, *supra*). In *Kemp v. Westbrook* (1749, 1 Ves. 278) it was said that where no time is fixed the pledgor has all his life to redeem. A premature sale entitles the pledgee to recover only such damages if any, as he has suffered beyond the sum due on the pledge (*Halliday v. Holgate*, 1868, L. R. 3 Ex. 299; see *Donald v. Suckling*, 1866, L. R. 1 Q. B. 585). The surplus, if any, beyond the sums due on the pawn (including in the surplus any profits on the sale beyond its nominal value, *Langton v. Waite*, 1868, L. R. 6 Eq. 165) belongs to the pledgor.

8. *Transfer and Sub-Pledge*.—The pledgee may also make a transfer of his rights, or repledge the goods to the extent of his own interest (*Donald v.*

Suckling, supra; see *France v. Clark* (1883, 22 Ch. D. 830), cited under BLANK TRANSFER).

9. *Action for Debt*.—The pledgee may sue for the balance not covered by the sale, or sue for the debt without selling (*South Sea Co. v. Duncomb*, 1732, 2 Stra. 919; cp. *Jones v. Marshall*, 1889, 24 Q. B. D. 269), or if the goods perish without his fault (Bac. Abr. "Bailment" B.).

10. *Duty of Pledgee—Care*.—He is liable for any loss or injury due to negligence. It is said he must use ordinary care (see per Holt, C.J., in *Coggs v. Bernard, supra*, cited vol. i. p. 456; see also *In re United Service Co.*, 1870, L. R. 6 Ch. 212). So he is not liable for loss if property is stolen without his fault (Bac. Abr. "Bailment" B.; Story, ss. 333 *et seq.*; the opinion of Sir William Jones was the other way, *ibid.*), or for loss by an accidental fire (*Syred v. Carruthers*, 1858, El. B. & E. 469; cp. the Pawnbrokers Act, s. 27, below). But after tender of what is due, he retains possession as a wrongdoer, and is liable for any loss which then occurs (see per Holt, C.J., *ubi supra*).

11. *Determination of the Pledgee's Rights—Tender*.—The pledgor can redeem, upon tendering the sums due upon the pledge, at any time before sale, even after the period, if any, agreed upon for payment (Story, ss. 345, 346; Com. Dig. "Mortgage" B.; *Kemp v. Westbrook*, cited above, 7.), at any rate during the pledgee's life (*ibid.* and *l.c.*), and according to modern opinion the right passes to his executors (Story, s. 348, citing *Demainbray v. Metcalf*, noted *supra*; *Vandersee v. Willis*, 1789, 3 Bro. C. C. 21; cp. Pawnbrokers Act, s. 9, below). After a very long delay without any claim for redemption, the right might be presumed to have been abandoned (Story, ss. 346, 362; see ACQUIESCENCE).

After a proper tender, the pledgor can sue in detinue or trover for the goods, for the property reverts to him. A tender by one only of two joint pledgors is not sufficient to enable the pledgor making it to sue (*Harper v. Godsell*, 1870, L. R. 5 Q. B. 422).

The assertion by the pledgee that the goods are his own does not excuse the necessity of tendering the sums due before the pledgor sues to recover the goods or for conversion (*Yongsmann v. Briesmann*, 1892, W. N. 162; *Halliday v. Holgate*, above, 7.).

12. *Redelivery—Loss of Possession*.—The pledge is determined by redelivery to the pledgor, unless the redelivery is for a limited purpose only (*Reeves v. Capper*, 1838, 5 Bing. N. C. 136; *North-Western Bank v. Poynter*, [1895] App. Cas. 56), or unless he procure the redelivery by fraud (*Babcock v. Lawson*). It is said that at common law loss of possession to a third party determines the pledge (Story, s. 299; *Cooke v. Haddon*, 1862, 3 F. & F. 229; but see the leading case, *Meyerstein v. Barber* (1866, L. R. 2 C. P. 38, 661, and 4 H. L. 317); and *Halliday v. Holgate* and *Donald v. Suckling*, cited above, 7.).

13. *Execution—Distress*.—The pledge is not liable to be distrained upon for the pledgee's rent if pledged "in the way of his trade" (*Swire v. Leach*, 1865, 18 C. B. N. S. 479), or to be taken in execution for the debt of the pledgor, at any rate without payment of the sums due to the pledgee (Story, s. 353), but it is liable to execution for the pledgee's debt, to the extent of his interest (*In re Rollaston*, 1887, 34 Ch. D. 495).

[*Authorities*.—Story on *Bailments*, ch. v.; Turner on the *Contract of Pawn*; Robbins on *Mortgage*, ch. lxiii. See further the article on BAILMENTS.]

B. UNDER THE PAWNBROKERS ACT, 1872.

14. *Scope of the Act*.—Pawns to a "pawnbroker" are regulated, as between the pawnbroker and the customer, and anyone claiming under

the latter (*Singer Manufacturing Co. v. Clark*, 1879, 5 Ex. D. 37), by the provisions of the Act (35 & 36 Vict. c. 93). These regulations fix the terms of the contract where the amount of the loan is not greater than 40s. Where it exceeds that amount, but does not exceed £10, a special contract is permitted (below, 16.). The Act does not apply to loans exceeding £1 (s. 10). "Pawnbroker" is defined as including "every person who carries on the business of taking goods and chattels in pawn," and, to prevent evasion, the definition is extended to every keeper of a shop for the purchase or sale of goods, or for taking in goods as security, who lends or pays any sum not greater than £10 on the goods, or on an arrangement for sale and repurchase (s. 5).

15. *Regulations and Restrictions*.—A pawnbroker must have a year's licence (which costs £7, 10s.) for each shop (s. 37). The licence is issued only on the certificate of a stipendiary magistrate (s. 40), or of the district council (Local Government Act, 1894, ss. 27, 32). He is responsible for the acts of his servants done in the course of, or in relation to, his business (s. 8); must exhibit his name over the door, and keep posted up in his shop a copy of the fixed terms of contract (s. 13); must only sell pawns in accordance with the Act (ss. 19, 23, 32); must not take any pledge from a child apparently under twelve years old, or from an intoxicated person, or employ an assistant under sixteen years old to take in pledges, or carry on business on Sunday, Good Friday, Christmas Day, or any day appointed for public fast, humiliation, or thanksgiving (s. 32); must not take another pawnbroker's pawn ticket as a pledge or buy it; or, within the time fixed for redemption, buy any goods pledged to himself, except at an auction, or contract with the pawnor or owner of such goods for the purchase or disposition of them (s. 32). He is also required to keep and use the books and documents following (s. 12), viz.—(1) a *pledge-book* showing the particulars of every loan; (2) *pawn tickets* showing the terms of the contract—he must give a ticket to the pawnor (s. 14); (3) a *sale-book*, of pledges above 10s., which any holder of a pawn ticket has a right to inspect within three years of the auction at which his pledge is sold (s. 21); (4) forms of *declaration* in respect of claims by the true owner of a pawn; (5) similar forms in respect of lost tickets; (6) forms of receipt (the receipt needs no stamp unless the profit amounts to 40s., s. 15); and (7) forms of special contract. All these forms are given in the schedule to the Act.

There are special prohibitions forbidding the pawnbroker knowingly to take in pawn any linen, apparel, or unfinished goods delivered to any person to wash, etc., or to finish or make up (s. 35). Search warrants may be issued in respect of such goods (s. 36).

16. *Terms of the Contract*.—The profit to be charged varies from $\frac{1}{2}$ d. per 2s. to $\frac{1}{2}$ d. per 2s. 6d. per calendar month, and the ticket costs a $\frac{1}{2}$ d. or 1d. according as the loan is for 10s. or 40s. or under, or is over 40s. (s. 15 Sched. 3, II.).

The pawnbroker is liable for loss by fire to the extent of 25 per cent. beyond the amount of the loan (s. 27), and compensation for any injury to the pledge occurring by the default, neglect, or wilful misconduct of the pawnbroker may be recovered from him summarily (s. 28).

A pledge for a loan not greater than 10s. becomes the pawnbroker's absolute property after twelve months and seven days (s. 17). After a like interval any other pledge may be sold at a pawnbroker's auction, held and advertised as prescribed (ss. 18, 19, Sched. 5). The pawnbroker may buy at such auction. The surplus realised, after deducting the money due and costs, must be repaid to the holder of the ticket, or may be set off against

what is deficient on the sale of another pledge of the same person within twelve months (s. 22). The pawnbroker may sue for a deficiency on the sale, and whether there is a "special contract" or not (*Jones v. Marshall*, 1889, 24 Q. B. D. 269).

The holder of the pawn ticket, who is presumed, as between the pledgor and anyone claiming under him, to be entitled to the goods (s. 25; *Singer Manufacturing Co. v. Clarke*, above, 14.), unless a declaration is made as below, may redeem at any time before the pledge becomes the pawnbroker's property, or is sold. The executors or administrators or assigns of the pawnor, on producing their probate, letters of administration, or assignment, if so required, are also entitled to redeem (s. 9). The pawnbroker is not bound to redeliver the pledge unless the ticket is delivered to him, or a declaration is duly made in accordance with the Act (s. 26).

If the ticket is lost, mislaid, or parted with by mistake (*Burslem v. Attenborough*, 1873, L. R. 8 C. P. 122), destroyed, or stolen, or obtained by fraud from the owner, he may obtain a form of declaration from the pawnbroker, and make the declaration (together with someone to identify him) before a magistrate (s. 29) or commissioner for oaths (54 & 55 Vict. c. 50, s. 1). The pawnbroker need not deliver the pawn to anyone till the expiration of three business days from the time when the declaration is obtained, and at the end of such three days may deliver it to the declarant, unless he has notice that the declaration is false (s. 29). But the declarant need not redeem immediately (*Burslem v. Attenborough*, *supra*).

A "special contract" in respect of a loan of above 40s. may be made, varying the statutory terms as to the profit chargeable and the period of the loan. It must be in the prescribed form, and be signed by both parties. It requires no stamp (s. 24).

17. *Order for delivery up*.—A Court of summary jurisdiction may order a pawnbroker to deliver a pledge to the owner, where any person is convicted by the Court of knowingly pawning it without authority, or of feloniously or fraudulently obtaining it; or where, in any proceedings before the Court, the pledge appears to have been unlawfully pawned (s. 30). And the Court may order delivery of a pledge to the person entitled to it, on payment of the amount of the loan and profit, if the pawnbroker refuse to deliver it (s. 31).

18. *Detention by Pawnbroker*.—If anyone who offers a thing in pawn to a pawnbroker refuses to give a satisfactory explanation of how he became possessed of it, or gives false information; and if anyone seeks to redeem a pledge without colour of title; and where the pawnbroker reasonably (*Howard v. Clarke*, 1888, 20 Q. B. D. 558) suspects that a thing offered has been stolen, or illegally or clandestinely obtained, the pawnbroker may detain the person and the thing, and deliver them to a constable (s. 34). So he may detain any person uttering or offering a pawn ticket which he reasonably suspects to have been counterfeited, forged, or altered (c. 49). A magistrate may award to a pawnbroker acting under sec. 34 compensation for his loss of time in attending the Court.

19. *Offences against the Act* are (in most cases) punishable by a fine of £10.

[*Authorities*.—Turner's *Pawnbrokers Act*; Attenborough's *Pawnbrokers Act*.]

Pay and Pensions.—Provisions are made by the statutes relating to the various armed forces, and by regulations or warrants issued

in accordance therewith, and supplementing them, by the authorities governing each department, for the pay of the officers and men constituting these forces. Full pay according to the various degrees of rank is provided for officers of the army, marines, and navy during actual service; half pay when, under the regulations, they retire temporarily from active duty; retired pay when they cease to become eligible for appointment and promotion, on account of age or otherwise, but are entitled, in accordance with the regulations, to a continuance of pay on a prescribed scale.

Half-pay officers are liable to resume full pay and active duty at any time; the half pay being considered in the light of a retainer for future services.

Retired combatant officers of the military (that is, of cavalry corps, artillery, engineers, the army service corps, and the infantry regiments) remain liable to be recalled upon emergencies up to various ages for various ranks (see sec. 6 Royal Pay Warrant, 1897). The same requirement to serve is contained in the Admiralty Regulations, upon an Order in Council, in case of war or emergency.

In the army half pay is not allowed where the officer holds a civil appointment entered on after 25th May 1892, unless it is of a temporary nature, and the profits of it are uncertain and in the nature of fees for piece-work.

The assignment of charges on, and agreements to assign, etc., any pay, pension, or military or naval reward payable to officers, or soldiers, or petty officers, or seamen, or payable to their wives and families, except so far as the same may be allowed by regulations, are void (Naval and Marine Pay and Pensions Act, 1865 (28 & 29 Vict. c. 73), and Army Act, 1881 (44 & 45 Vict. c. 58, s. 141)).

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 53, where a bankrupt is *inter alia* an officer of the army or navy, the trustee is to receive for distribution so much of the bankrupt's pay or salary as the Court, on the application of the trustee, with the consent of the chief officer of the department under which the pay or salary is enjoyed, may direct. If he is entitled to any half pay or pension, the Court, on the application of the trustee, is from time to time to make such order as it thinks just for the payment of the half pay or pension, or of any part thereof, to the trustee, to be applied as the Court may direct. But this does not take away or abridge any power of the department to dismiss a bankrupt, or to declare the pension or half pay to be forfeited.

An officer who is in receipt of a "gratuity" in the nature of a pension according to the regulations upon retirement, but on the condition that he shall be an Army Reserve Officer, and liable to be called on for service up to the age at which such obligation would regularly cease, comes under part 2 of the above-mentioned section, as being in receipt of a "pension," and not in the position of an officer on half pay in receipt of a retaining fee for future services. It is in the discretion, therefore, of the Court what order shall be made. The amount depends on the circumstances of the case, according to the Court's "knowledge of life" (*In re Ward*, [1897] 1 Q. B. 266).

As to the reductions which alone may be made from the pay of officers and soldiers in service, see secs. 136-140 Army Act, 1881. For the navy, see Admiralty Regulations, 1879, pp. 431 *et seq.*, established by Order in Council made under the Pay and Pensions Act, 1865.

For the provisions as to the maintenance by soldiers of their wives and children and illegitimate children, by appropriation of part of their pay,

see sec. 145 Army Act, 1881 ; there is no similar provision as to sailors, either in the statutes or in the regulations.

By the Pensions Act, 1839 (2 & 3 Vict. c. 50), it is provided (s. 2) that where poor-law relief is given to any person entitled to, or in receipt of, any army or naval pension, or any superannuation or other allowance in respect of his service in the army, navy, marines, or any other branch of the military service, or in any civil branch of the army, navy, or marines, or to his wife or to any person whom he may be liable to maintain, by admission of such pensioner, his wife, or person into the workhouse of any union or parish, the guardians may require such pensions to be paid to them. For the rest of the provisions regarding the maintenance by poor-law authorities of wives of pensioners who have become chargeable in case of lunacy, etc., see ss. 3-10.

As to the commutation of pensions, including half pay and retirement allowances, gratuities, etc., see The Pensions Commutation Act, 1871 (34 & 35 Vict. c. 36), and 1882 (45 & 46 Vict. c. 44). They apply *inter alia* to commissioned officers and warrant officers in the army and navy, and subordinate officers in the navy.

The Pensions and Yeomanry Pay Act, 1884 (47 & 48 Vict. c. 55), provides that it shall be lawful for Her Majesty, by Order, from time to time to make, and when made to revoke and vary, orders relating to pensions of soldiers, and to the pay and pensions of the yeomanry, including the commutation of pensions, the restoration of forfeited pensions, and the award and payment of both such pay and pensions as aforesaid. This includes the case of the Chelsea out-pensioners,—the Act 19 & 20 Vict. c. 15 as to these pensions being repealed by the last-mentioned Act. An order has been made that when such pensioners and their wives and families become chargeable to the guardians, the latter may apply the whole or part of their pensions, with the consent of the Secretary of State, to their maintenance (see Glen, *Poor Law Orders*, 8th ed., p. 237).

See ARMY ; COMMISSION ; COURTS-MARTIAL ; ENLISTMENT ; MILITIA ; NAVY ; OFFICERS ; RESERVE FORCES ; VOLUNTEERS ; YEOMANRY.

Payment.—*What Constitutes.*—In its strictest sense, the term “payment” means the performance of an obligation by the delivery of a sum of money in current coin or bank notes. But a payment may also be constituted by a transfer of a sum of money from one account to another, or, where there are cross demands, by a settlement of accounts between the parties. Thus, where a debtor and creditor both had accounts at the same bank, it was held that a transfer in the books of the bank of the amount of the debt from the account of the debtor to that of the creditor, made with the consent of both parties, operated as a payment of the debt (*Bolton v. Richard*, 1795, 6 T. R. 139 ; *Bodenham v. Purchase*, 1818, 2 Barn. & Ald. 39). So, where there are cross demands, if the parties account with each other, stating certain sums to be due on each side, and such account is settled and agreed to by the parties, that is equivalent to payment of the sums so stated in the account (*Holland v. Russell*, 1861, 30 L. J. Q. B. 308 ; 32 L. J. Q. B. 297). In *Spargo's* case, 1870, L. R. 8 Ch. 407, a company, being indebted to a shareholder, agreed to set off the amount payable on the shares against the debt, and it was held that that constituted a payment for the shares in cash within the meaning of sec. 25 of the Companies Act, 1867. A settlement of accounts does not, however,

operate as a payment, if the items are all on the one side, but only in the case of cross demands (*Perry v. Attwood*, 1856, 25 L. J. Q. B. 408).

As between banker and customer, the receipt by a bank of credit in account with another bank is generally equivalent to payment of the amount so credited in account. Thus, where A. deposited notes with his banker, who sent them to the issuing bank and received credit for them it was held that A.'s banker must account to A. for the amount, though, in consequence of the failure of the issuing bank, he never actually received payment for the notes (*Gillard v. Wise*, 1826, 5 Barn. & Cress. 134; see also *Pollard v. Bank of England*, 1871, L. R. 6 Q. B. 623; *McCarthy v. Colvin*, 1839, 9 Ad. & E. 607). So, if a debtor gives his creditor an order on a bank for the amount of the debt, and the creditor elects to take a bill from the banker in lieu of cash, or otherwise accepts the banker as his debtor, that constitutes a valid payment as between the original debtor and creditor, though the bill is dishonoured, or the debt is never actually paid by the banker (*Smith v. Ferrard*, 1827, 7 Barn. & Cress. 19). Otherwise, if the banker merely promises to give credit for the amount in the future, and becomes bankrupt before doing so, the creditor not having accepted him as his debtor (*Pedder v. Watt*, 1795, 2 Peake, 41).

Where a creditor requests his debtor to pay the amount of the debt to a third person, and the debtor does so, that is equivalent to payment to the creditor (*Roper v. Bumford*, 1810, 3 Taun. 76). So where there was a dispute between a buyer and seller of goods as to the quality, and it was agreed that the seller should accept part of the price, and that the balance should be deposited with a third person to abide the result of the difference, it was held that the payment of part of the price, and deposit of the balance, in accordance with the terms of the agreement, constituted a payment of the whole of the price (*Page v. Meek*, 1862, 32 L. J. Q. B. 4). On the other hand, where certain sureties arranged with the creditor that, in lieu of their personal liability, they should deposit a certain sum in a bank to a suspense account, which sum the creditor had power to appropriate towards the debt, but had not done so, it was held that the deposit did not amount to a payment, and that the creditor was entitled to prove for the whole amount of the debt in the bankruptcy of a surety who had not assented to the arrangement (*Commercial Bank of Australia v. Wilson*, [1893] App. Cas. 181).

Of Lesser Sum in Satisfaction of a Greater.—An agreement between a debtor and creditor, that the creditor shall accept from the debtor a lesser sum in money than the whole amount of the debt, is *nudum pactum* unless it is supported by some consideration other than the payment of such lesser sum; and notwithstanding any such agreement, the creditor can treat the payment of the lesser sum as a part payment only, and recover the residue of the debt (*Cumber v. Wane*, 1718, 1 Sm. L. C. 325 and notes thereto; *Down v. Hatcher*, 1839, 10 Ad. & E. 121). This principle was confirmed by the House of Lords in *Foakes v. Beer*, 1884, 9 App. Cas. 605, where it was held that an agreement between a judgment debtor and creditor, that in consideration of the debtor paying down part of the debt and costs, and on condition of his paying the residue by instalments, the creditor would not take any proceedings on the judgment did not prevent the creditor, after payment of the whole of the debt and costs according to the agreement, from enforcing payment of interest on the judgment. On the other hand, the delivery of anything else than a sum of money, whatever may be its value, is a sufficient consideration for an agreement by a creditor to accept the same in satisfaction of the debt.

If, therefore, a creditor agrees to accept in full discharge a bill of exchange, or even a cheque drawn by the debtor, for a less sum than the whole debt, the delivery of such bill of exchange or cheque, being something different than a payment in money, operates as a satisfaction of the debt (*Goddard v. O'Brien*, 1882, 9 Q. B. D. 37, where a cheque for £100 was accepted in satisfaction of a debt of £125, 7s. 9d.; *Curlew v. Clark*, 1849, 3 Ex. Rep. 375; *Bidder v. Bridges*, 1887, 37 Ch. D. 406). But it must appear that the creditor has agreed to accept the bill or cheque in full discharge. Where a debtor sent a cheque "to balance account as per enclosed statement," having deducted a certain sum for alleged defective work, and the creditor acknowledged the receipt of the cheque "on account," it was held that the creditor was not precluded in point of law by having retained and cashed the cheque, from suing for the balance of the account which had been deducted in respect of the alleged defective work (*Ackroyd v. Smithies*, 1886, 54 L. T. 130). The creditor is not bound, in such a case, to either keep the cheque on the terms on which it is sent or return it, and if he keeps it, it is a question of fact, to be determined according to the circumstances, whether or not it is taken in satisfaction of the whole demand (*Day v. McLea*, 1889, 22 Q. B. D. 610; *Hough v. May*, 1836, 4 Ad. & E. 954).

The principle, that the payment of a lesser sum in money cannot operate as a satisfaction of a liability to pay a greater sum, only applies in the case of a liquidated demand, and only where there is no other consideration for the agreement to accept the lesser sum than the payment of such sum. The withdrawal of a plea of infancy by a defendant, and the abandonment of his defence, is sufficient consideration for such an agreement, whether the plea is true or false, and whether the demand is liquidated or unliquidated (*Cooper v. Parker*, 1853, 14 C. B. 118; 15 C. B. 822). And composition arrangements with creditors form an exception to the rule, the agreement by each of the creditors to accept the same dividend and be treated on the same footing as the others being considered sufficient consideration for the agreement by each of them to accept less than the full amount of his debt (*Couldery v. Bartrum*, 1881, 19 Ch. D. 394; *Pfleger v. Browne*, 1860, 28 Beav. 391; *Kitchin v. Hawkins*, 1866, L. R. 2 C. P. 22; *Eyles v. Ellis*, 1827, 4 Bing. 112).

Where a tenant for many years paid rent, less certain sums which he deducted as allowances in respect of land tax, and the landlord accepted such payments without demur, and with a full knowledge of the circumstances, it was held that that was not the same as a partial payment, but had the same effect as if the tenant had paid the full amount of the rent, and the landlord had repaid the allowances deducted (*Bramston v. Robins*, 1826, 12 Moo. K. B. 68).

By Bills, Notes, and Cheques.—A creditor is not bound to take a bill, note, or cheque (except notes of the Bank of England) in payment of a debt; and if he does do so, it only operates as a conditional payment, unless he expressly agrees to take the instrument in absolute payment, and to run the risk of its not being paid, or there are special circumstances from which such an agreement may be implied (*Sayer v. Wagstaff*, 1844, 5 Beav. 415; *Price v. Price*, 1847, 16 Mee. & W. 232; *Owenson v. Morse*, 1796, 7 T. R. 64; *Taylor v. Briggs*, 1827, Moo. & M. 28; *Tapley v. Martens*, 1800, 8 T. R. 451; *Sard v. Rhodes*, 1836, 1 Mee. & W. 153; *Simon v. Lloyd*, 1836, 2 C. M. & R. 187; *Maxwell v. Deare*, 1849, 8 Moo. P. C. 364; *In re London, etc., Bank*, 1865, 34 L. J. Ch. 418). Where a bank bill was sent to a solicitor for the amount of a debt of which he requested payment, and

he kept the bill, but wrote saying that he could not accept it without costs, but did not raise any other objection, it was held that that was evidence of payment of the debt (*Caine v. Coulton*, 1863, 1 H. & C. 768).

Where a bill, note, or cheque is taken as a conditional payment, all remedies for the recovery of the debt are suspended until and unless the instrument is due and has been dishonoured (*Kearslake v. Morgan* 1794, 5 T. R. 513; *Ex parte Matthew*, 1884, 12 Q. B. D. 506; *Walton v. Mascall*, 1844, 2 Dow. & L. 410; *Belshaw v. Bush*, 1851, 11 C. B. 191; *Kendrick v. Lomas*, 1832, 2 Crompt. & J. 405; *Pearce v. Davis*, 1836, 1 Moo. & R. 365); and in an action for recovery of the debt, it is not necessary for the debtor to prove that the instrument has been paid, the payment thereof being presumed until the contrary is shown (*Mercer v. Cheese* 1842, 4 Man. & G. 804; *Hebden v. Hartsink*, 1801, 4 Esp. 46). So, if a payment is made by cheque, and the cheque is duly paid, there is no debt owing or accruing due between the giving of the cheque and the payment thereof (*Elwall v. Jackson*, 1884, 1 C. & E. 362); but if the cheque is not paid, the debt revives *ab initio*, as if no cheque had been given (*Cohen v. Hale*, 1878, 3 Q. B. D. 371). Where, however, a bill or note is taken by a solicitor in payment of a bill of costs, the bill of costs is not deemed to be paid, for the purpose of excluding taxation, until the bill or note has been paid, unless it is proved that he intended to take it as a payment in any event (*Ex parte Snell*, [1893] 2 Q. B. 286; *In re Harries*, 1844, 13 Mee. & W. 3).

If a bill or note is taken as a conditional payment, and is dishonoured the creditor may sue for the original debt, although the bill or note has in the meantime been transferred to a third person, provided it is again in the hands of the creditor at the commencement of the action, or is in the hands of such third person as a trustee or agent for the creditor (*Burden v. Halton*, 1828, 4 Bing. 454; *Tarleton v. Allhusen*, 1834, 1 Ad. & E. 32; *National Savings Bank Association v. Tranah*, 1867 L. R. 2 C. P. 556; *Hadwen v. Mendizabel*, 1825, 10 Moo. K. B. 477), but not if it is in the hands of a third person in his own right at the commencement of the action, because the debtor would also be liable to be sued by such third person on the dishonoured instrument (*Davis v. Reilly*, [1898] 1 Q. B. 1).

It is the duty of a creditor, where he takes a bill as security for a debt, to duly present the bill for payment, and if it is dishonoured, to give due notice of dishonour to the parties liable; and if the bill becomes worthless in consequence of his failure to perform such duty, the debtor is discharged (*Peacock v. Pursell*, 1863, 14 C. B. N. S. 728; *Smith v. Mercer*, 1868, L. R. 3 Ex. 51). In *Smith v. Mercer*, where it was agreed that a debt should be paid by "approved bills," and approved bills were delivered to the creditor, but were not indorsed by the debtor, it was held that the liability of the debtor, though he was not a party to the bills, was not more extensive than if he had indorsed them, and that, therefore, he was discharged by the failure of the creditor to give him notice of dishonour. In *Swinyard v. Bowes*, 1816, 5 M. & S. 62, however, where there was no agreement that the debt should be paid by means of a bill and the creditor took a bill as a conditional payment, it was held that he was under no obligation to give notice of dishonour to the debtor, who was not a party to the bill.

Where a cheque or note, or other instrument payable on demand, is given in payment, it is the duty of the creditor to present it within a reasonable time, and if he fails to do so, to the prejudice of the debtor.

the instrument operates as an absolute payment as between the debtor and creditor (*Camidge v. Allenby*, 1827, 6 Barn. & Cress. 373; *Chamberlyn v. Delarive*, 1767, 2 Wils. 353; 45 & 46 Vict. c. 61, s. 74; see also *Alderson v. Langdale*, 1832, 3 Barn. & Adol. 660).

A forged or insufficiently stamped instrument cannot operate as a payment, even though it might have in fact been paid if duly presented (*Bell v. Buckley*, 1856, 11 Ex. Rep. 631; *Wilson v. Vysar*, 1812, 4 Taun. 288; *Cundy v. Marriott*, 1831, 1 Barn. & Adol. 696; *Brown v. Watts*, 1808, 1 Taun. 353; *Wilson v. Kennedy*, 1794, 1 Esp. 245; *Tyte v. Jones*, 1788, 1 East, 58 n.; *Ruff v. Webb*, 1793, 1 Esp. 129).

Payment through the Post.—If a debtor is requested by the creditor to remit the amount of the debt by post, the creditor must take the risk of any loss in transmission (*Warwicke v. Noakes*, 1791, 1 Pea. 98); but the mere fact that a person is in the habit of buying goods from another, and paying for them by means of a cheque through the post, and that the seller never makes any objection to such mode of payment, is not sufficient evidence of a request by the seller to the buyer to pay for the goods in that manner, so as to throw on the seller the loss of a cheque in transmission (*Pennington v. Crossley*, 1897, 77 L. T. 43).

Where a debtor, in answer to a letter from the creditor, demanding payment, sent a Post-Office order, in which the creditor was described by a wrong Christian name, and the creditor kept the order, but did not cash it, although he was informed by the Post Office that he might receive the money at any time by signing the order in the name of the payee, it was held that there was no evidence of payment of the debt, the debtor having no right to give the creditor the trouble of returning the order (*Gordon v. Strange*, 1847, 1 Ex. Rep. 477).

Payment by Stranger.—A payment of a debt by a third person, without the authority of the debtor, does not discharge the debt (*James v. Isaacs*, 1853, 12 C. B. 791; *Kemp v. Balls*, 1855, 10 Ex. Rep. 607); but the debtor may ratify such a payment, if he chooses, although he may have at first repudiated it, and it is then as effectual as if it had originally been made with his authority (*Simpson v. Eggington*, 1855, 10 Ex. Rep. 845); and a plea of payment by the debtor, in an action by the creditor for the debt, is a sufficient ratification (*Belshaw v. Bush*, 1852, 11 Q. B. 191). The creditor may, however, upon discovering that the debt was paid without the debtor's authority, return the money to the person who paid it, and if he does so, the debtor cannot subsequently ratify or take advantage of the payment (*Walter v. James*, 1871, L. R. 6 Ex. 124).

By Garnishee.—A payment made by a garnishee under garnishee proceedings operates as a valid discharge to him as against the judgment debtor, though the proceedings be set aside, or the judgment reversed (R. S. C. Order 45, r. 7; *In re Smith*, 1888, 20 Q. B. D. 321; *Culverhouse v. Wickens*, 1868, L. R. 3 C. P. 295). But this only applies where the payment is made by compulsion of law: a garnishee cannot discharge himself from liability to his original creditor by a voluntary payment to any other person (*Mayor of London v. L. J.-S. Bank*, 1881, 6 App. Cas. 393).

Of Partnership and Joint Debts.—A payment of a partnership debt to any one of the partners operates as a payment to the firm (*Porter v. Taylor*, 1817, 6 M. & S. 156). This rule applies although the partnership has been dissolved, and the debtor has had notice of the dissolution, at the time of the payment, provided that the payment is in money; but not if it is by way of set-off or settlement of accounts, unless the partner to whom the

payment is made was authorised by the other partners to receive payment in that manner (*Nottidge v. Prichard*, 1834, 2 Cl. & Fin. 379).

Where a partnership is dissolved, and a creditor of the firm takes a bill or note from one or more of the partners, the question whether the other partners are discharged, in the event of the bill or note not being paid depends upon whether the creditor intended to take the bill or note in settlement of the joint debt, and to accept the liability of the parties to the instrument in substitution for the liability of the firm, and is a question of fact (*Thompson v. Percival*, 1834, 5 Barn. & Adol. 932; *Bedford v. Deakin*, 1818, 2 Barn. & Ald. 217; *Evans v. Drummond*, 1801, 4 Esp. 91; *Reed v. White*, 1804, 5 Esp. 122; *Lyth v. Ault*, 1852, 21 L. J. Ex. 217).

There is some conflict of authority as to whether a payment to one of two or more joint creditors, not being partners, without the consent of the other or others, operates as a discharge. In *Wallace v. Kelsall*, 1840, 7 Mee. & W. 264, where an action was brought by three plaintiffs for a joint debt, and the defendant pleaded an "accord and satisfaction" with one of the plaintiffs by a part payment in cash and a set-off of a debt due from that plaintiff to the defendant, it was held that the plea was valid, without any allegation that the other plaintiffs had authorised the settlement. So, in *Husband v. Davis*, 1851, 10 C. B. 645, it was held that the payment of a bond debt to one of two co-trustees or other joint creditors operates as a discharge with respect to both. On the other hand, it was laid down in *Stone v. Marsh*, 1826, Ry. & M. 364, and in *Innes v. Stephenson*, 1831, 1 Moo. & R. 145 that where money is paid into a bank to the joint account of two or more trustees or other persons who are not partners, the banker is not discharged by a payment to one of them without the authority of the other or others (see also *Can v. Read*, 1749, 3 Atk. 695; *Steeds v. Steeds*, 1889, 22 Q. B. D. 537).

Proof of.—A payment is generally proved by the production of a receipt but may also be proved by any other evidence tending to show that the payment was in fact made. The production of a cheque drawn by the debtor on his bank in favour of the creditor, and which appears to have been received by the creditor, is evidence from which a payment may be inferred (*Egg v. Barnett*, 1800, 3 Esp. 193). So, if it is proved that the debtor drew a cheque in favour of the creditor, and that the creditor received the proceeds of such cheque at the bank, that is evidence of payment, without proof that the creditor had received the cheque from the debtor (*Mountford v. Harper*, 1847, 16 L. J. Ex. 184). And where a long time has elapsed since the debt was incurred, a payment thereof may be presumed, quite apart from the Statute of Limitations, if the circumstances are such that in the ordinary course of things the debt would have been paid, and the delay is not accounted for (*Lucas v. Novoskolieski*, 1798, 1 Esp. 296; *Cooper v. Turner*, 1819, 2 Stark. N. P. 497).

A receipt does not operate by way of estoppel, and is not conclusive evidence of payment or satisfaction: it is merely *prima facie* evidence which may be rebutted by other evidence tending to show that the debt was not in fact paid (*Phillips v. Warren*, 1845, 14 Mee. & W. 379; *Skaif v. Jackson*, 1824, 3 Barn. & Cress. 421; *Graves v. Key*, 1832, 3 Barn. & Adol. 313; *Lee v. Lancashire and Yorkshire Ry. Co.*, 1871, L. R. 6 Ch. 527). See also RECEIPT.

As to the appropriation of payments, see APPROPRIATION OF PAYMENTS as to payments to and by agents, brokers, etc., see PRINCIPAL AND AGENT; BROKER, FACTOR; as to part payment, so as to defeat the operation of the Statute of Limitations, see LIMITATIONS (STATUTE OF); and as to the payment of workmen's wages otherwise than in current coin, see TRUCK ACTS.

Payment for Honour.—See *BILLS OF EXCHANGE*.

Payment in Due Course.—See *BILLS OF EXCHANGE*.

Payment into Court.—A full account of the law relating to payment into Court cannot conveniently be set out in one article, but amongst the more important matters relating to this subject may be mentioned the following:—

(1) *Payment into Court by way of Defence to an Action to recover a Debt or Damages.*—Order 22 of the Rules of the Supreme Court deals with this, and from the rules of that order, together with the decided cases upon it, the law and practice may be gathered to be as follows:—

A defendant, or a plaintiff in reply to a counterclaim, may pay into Court a sum of money in satisfaction of the cause of action alleged against him, and in so doing may admit or (save when the cause of action in respect of which he pays is libel or slander) deny liability, and may pay in with or without a plea of tender (see *TENDER*). If he pleads a tender, he must bring the money into Court. The payment should be made before or at the time of delivering the defence, though it may be made at any time by leave of the Court or a judge; the amount paid in may, with similar leave, be increased. Payment into Court must be signified either in the defence or (if defence be not delivered) in a notice in a prescribed form, and the claim or cause of action in satisfaction of which such payment is made must be specified. If there be several causes of action and a lump sum be paid in by the defendant in satisfaction, the Court may in its discretion order the defendant to state generally the heads of claim in respect of which the payment is intended to be made, or to order him otherwise to allocate the money (see note to Order 22, r. 2, in the *Annual Practice*). When the action is tried by a jury, the fact that money has been paid in, and the amount, must be kept secret from the jury until after verdict; but query how far the practice should be observed in actions under the Libel Act of 1845.

If the payment into Court is made with a defence setting up a tender before action, the plaintiff, or (on the plaintiff's written request) the plaintiff's solicitor, may take the money out of Court unless the Court or a judge shall otherwise order (Order 22, r. 5 (c)). A tender and subsequent payment in is a defence to the action, and if the amount paid prove sufficient to satisfy the demand of the plaintiff, the defendant succeeds; if it prove insufficient, the plaintiff succeeds as to the excess, and sometimes as to the whole action (see on this point, *James v. Vane*, 1860, 29 L. J. Q. B. 169). The plaintiff is not entitled to take out the money and to tax his costs as though he had succeeded in the action; he must go to trial, or admit the sufficiency of the tender, and in the latter case the defendant is entitled to the costs incurred to date of the admission (*Griffiths v. School Board of Ystradyfodwg*, 1890, 24 Q. B. D. 307). It should be observed that this defence, tender and payment into Court, cannot be set up in answer to a claim for unliquidated damages (see per Lindley, L.J., in *Davys v. Richardson*, 1888, 21 Q. B. D. at p. 205). The rules of Order 22 do not apply to a payment into Court in an Admiralty action after the question of liability has been determined by agreement between the parties and the question of the amount of damages has been referred; probably Order 22 does not apply to Admiralty actions at all (*The Mona*, [1894] Prob. 265).

If the payment is to be made without a plea of tender and in suchwise as to admit liability, the plaintiff, or his solicitor if authorised in writing, may obtain the money out of Court, and may—if the entire claim or cause of action is satisfied—tax his costs after the expiration of four days from the time of service on the defendant of a notice of acceptance of the money paid in, unless the Court or a judge shall otherwise order. If the costs are not paid within forty-eight hours after the taxation, he may sign judgment for the costs so taxed (Order 22, rr. 5 and 7). The notice of acceptance may be given by the plaintiff at any time before the expiration of the time for putting in his reply, or—if the defendant pays in before defence—within four days of the time when plaintiff receives notice thereof (*ibid.*). The payment in of a sum without denial of liability admits a liability to the extent of the amount paid in, but it admits nothing more; and the defendant who pays in a lump sum in respect of a claim involving several items may set up any defence he has to rebut the demand for the excess beyond the amount paid in (*Hennell v. Davies*, [1893] 1 Q. B. 367). The plaintiff would do well to obtain particulars of the items in respect of which the payment is made; the Court has a discretion to order particulars to be given (see the case cited under Order 22, r. 2, in the *Annual Practice*).

If the plaintiff accepts the money paid in without denial of liability, can he proceed with his action for the balance of his claim, if any? It is said to have been frequently done (but see *Gray v. Bartholomew*, below). The Court or a judge may prevent the money being paid out pending the action, and if it proves on the hearing that the amount paid in is sufficient or more than sufficient to satisfy the claim, the defendant will usually get his costs from the time of payment in, though no tender be pleaded or proved (*Goutard v. Carr*, 1884, 13 Q. B. D. 598; *Wheeler v. United Telephone Co.*, 1884, 13 Q. B. D. 597). If the amount paid in exceeds that to which the plaintiff proves himself entitled, the Court has power to order the difference to be paid out to the defendant (*Gray v. Bartholomew*, [1895] 1 Q. B. 209).

If the payment is made with denial of liability, the plaintiff may take the money out (Order 22, r. 6), but he may not take it out and continue the action. He may, however, refuse to accept the amount paid in as satisfaction of his demands, in which case the money will remain in Court and be subject to the order of the Court or a judge, and cannot be paid out of Court save pursuant to such order (*ibid.*); and no such order can be made until after the trial or other determination of the action (*Maple v. Earl of Shrewsbury and Talbot*, 1887, 19 Q. B. D. 463). If the plaintiff accepts the money in satisfaction he will get his costs, notwithstanding the denial of liability (*McIlwraith v. Green*, 1884, 14 Q. B. D. 766). If he does not accept it, the case goes for trial, and if in the result the decision goes for the defendant either on the plea denying liability or on the ground that the amount paid in is enough to satisfy the plaintiff's claim, the costs of the action are payable by plaintiff to the defendant; though, if the defendant win on the latter ground only, the costs which are incurred owing to denial of liability would ordinarily fall on defendant (*Berdan v. Greenwood*, 1878, 3 Ex. D. 251; *Wheeler v. United Telephone Co.*, 1884, 13 Q. B. D. 597; *The William Symington*, 1884, 10 P. D. 1). But all questions of costs are in the discretion of the Court (R. S. C. Order 65, r. 1). The practice in the County Court is the same (*Wood v. Leatham*, 1892, 61 L. J. Q. B. 215). If the plaintiff recovers less than the amount paid in, the defendant will have the balance paid out to him (see on this, *Gray v. Bartholomew*, [1895] 1 Q. B. 209).

The payment of money into Court under R. S. C. Order 22, though not a denial of liability, has the effect of a payment to the plaintiff conditional on his showing his right to it; hence, if the defendant becomes bankrupt, the plaintiff is a secured creditor to the extent to which his proof in the bankruptcy for the amount claimed by him in the action is admitted by the trustee (*In re Gordon*, [1897] 2 Q. B. 516).

(2) *Payment into Court as a Condition of obtaining Leave to Defend an Action.*—Under the provisions of Order 14, as to summary judgment, it is competent to the defendant to offer to bring money into Court, or the judge may order that money be paid in as a condition upon which leave to defend will be granted (R. S. C. Order 14, rr. 3 (a), 6). In such case the defendant may, if he pleases, and unless the Court or a judge otherwise orders, appropriate by his pleading the money paid in to any specified portion of the plaintiff's claim, and the money so appropriated will be deemed to have been paid in as though under Order 22, and the provision relating to payment out referred to above in the last preceding section of this article will apply (R. S. C. Order 22, r. 11). In any other case the money will not be paid out except in pursuance of an order of the Court or a judge (*ibid.*). And see SUMMARY JUDGMENT.

(3) *Payment in under the Provisions of Lord Campbell's Act, 1845.*—When a libel is published in a newspaper or other periodical, the defendant may plead want of malice and of gross negligence, and an apology, together with payment into Court. According to the Act, payment must be made before or at the time of defence, and no denial of liability can in such case be pleaded (R. S. C. Order 22, r. 1), though it is competent to the defendant to deny the meaning put upon his words by the plaintiff (*Mackay v. Manchester Press Co.*, 1889, 6 T. L. R. 16). If the plaintiff proceeds with his action and recovers more than the amount paid in, he is successful and gets his judgment, usually with costs. If he obtains a verdict for less, he may, perhaps, nevertheless be entitled to the amount paid in (see *Dunn v. Devon and Exeter News Co. Ltd.*, [1895] 1 Q. B. 211 n.; but query, see *Gray v. Bartholomew*, [1895] 1 Q. B. 209); even then the defendant obtains judgment, usually with costs incurred subsequent to the date of payment in, and the money paid in may be ordered to remain in Court to answer any balance of costs which may be due to the defendant (see, e.g., *Best v. Osborne*, 1897, 12 T. L. R. 419). Opinions differ somewhat as to whether the jury should be kept in ignorance of the fact that money has been paid in under this Act. Lord Russell of Killowen thinks not (see *Mackenzie v. Harris*, 1896, quoted in the *Annual Practice* under Order 22, r. 22); but the terms of the rule seem express.

If the defendant pays into Court under Lord Campbell's Act, and the jury, whilst finding the amount paid in to be sufficient, do not acquit him of malice and gross negligence, the plaintiff is entitled to judgment notwithstanding (R. S. C. Order 22; *Oxley v. Wilkes*, 1898, W. N. 48).

(4) *Payment into Court by Trustees.*—Trustees—including trustees under implied or constructive trusts and personal representatives of a deceased person (Trustee Act, 1893, s. 50)—or the majority of them having in their hands or under their control money or securities belonging to any trust, may pay the same into the High Court, and the same shall, subject to rules of Court, be dealt with according to the orders of the High Court (Trustee Act, 1893, s. 42). If the majority of trustees desire to pay into Court, and if the concurrence of the minority cannot be obtained, the Court has power to order the payment into Court; and if any such moneys or securities are deposited with any banker, broker, or other depositary, the

Court may order payment or delivery of the moneys or securities to the majority of the trustees for the purpose of payment into Court (*ibid.*). The costs of the trustees incidental to the payment in are not infrequently deducted by them before making the payment; if this is done improperly proceedings must be taken to recover the amount, but the Court cannot order them to replace the money on the application for payment out (*In re Parker's Will*, 1888, 39 Ch. D. 303). The Court has, independently of the Trustee Act, power to compel trustees to pay trust moneys into Court and it can do this whenever a party admits that he has trust moneys in hand, whether the admission be in a pleading, an affidavit, or, if it be clearly made or not denied, even verbally (*London Syndicate v. Lord*, 1878, 8 Ch. D. 84; *Hollis v. Burton*, [1892] 3 Ch. 226).

The procedure for payment into Court under the Trustee Act is governed by R. C. S. Order 54 (*b*), r. 4, and by the Supreme Court Funds Rule 41, to which reference should be made. It will be found that the trustee must file an affidavit setting out shortly the particulars of the trust (see form in *D. C. F.* p. 884), and give notice to interested persons; but if the fund consists of money or securities being, or being part of, or representing a legacy or residue to which a person beyond the seas is absolutely entitled, and on which the trustee has paid the legacy duty, or on which no duty is chargeable, the trustee may make the lodgment without affidavit on production of the Inland Revenue certificate, in manner prescribed by the Supreme Court Funds Rules for the time being in force. The affidavit must have annexed to it a schedule setting forth the trustee's name and address, the amount and description of the funds, the ledger credit to which the funds are to be placed, details as to the death duties paid, and a statement as to whether it is desired that the funds should be invested. If no affidavit is required, the trustee should leave with the Paymaster a request and certificate of the Commissioners of Inland Revenue in the prescribed form, viz. Form 16 in the Appendix to the Supreme Court Funds Rules, 1894. See further as to investment, Supreme Court Fund Rules, 1894, 73. Payment out of the funds can be by order only (S. C. F. R. 1894, 45), but such order may be obtained on summons when the money or securities do not exceed £1000 nominal value, or in any case where there has been a judgment or order declaring rights, or where title depends only on proof of identity, birth, marriage, or death of any person (R. S. C. Order 55, rr. 2 (1) (2), 13 *a*. As to procedure, see S. C. F. R. 1894, 46, and see *infra*).

(5) *Payment in under the Life Assurance Companies Act*, 1896.—The object of this Act is to enable a life insurance company (not being a society registered under the Friendly Societies Acts) to pay into Court moneys payable under a life policy in respect of which, in the opinion of the directors, they cannot otherwise obtain a sufficient discharge. The money must be paid into the High Court, or, if the head office is within the jurisdiction of the Chancery Court of the County Palatine of Lancaster, then it may be paid into that Court. The procedure is prescribed by rules of Court, which enact that—(*a*) an affidavit shall be filed by an authorised agent of the society, stating certain particulars; (*b*) the company shall not deduct any costs or expenses of or incidental to the payment in; (*c*) the leave of the judge must be obtained to the payment in if an action relative to the policy is pending; (*d*) the company shall forthwith give notice by letter to the interested parties if their names and addresses are known to the company; (*e*) interested parties may apply in the Chancery Division relative to the money. These rules are set out at length in the *Annual*

Practice as Order 54 (c); and see also Supreme Court Funds Rules, 1894, r. 41 a.

(6) *Payment in by way of Security for Costs.*—Payment into Court as security for costs is not generally insisted on, a bond or some other security usually sufficing (but see R. S. C. Order 65, rr. 6 *et seq.*, and notes thereto in the *Annual Practice*; and see SECURITY FOR COSTS. Security for the costs of discovery by interrogatories or otherwise is, unless the Court or a judge otherwise orders, a condition precedent to the making of an effectual order for discovery (see DISCOVERY), and takes the form of a payment into Court of a sum of money; such money is paid in to a separate account in the action called the "Security for Costs Account." The parties cannot of themselves waive the necessity for security (*Aste v. Stumore*, 1884, 13 Q. B. D. 326). If there are several parties and but one set of interrogatories is delivered, only one deposit as security is usually required (*Eder v. Attenborough*, 1889, 23 Q. B. D. 130); similarly the one deposit will often cover the several affidavits of documents (see on this, *Joyce v. Beale*, [1891] 1 Q. B. 459).

(7) *Payment in by Receivers.*—Receivers appointed out of Court, *e.g.* under the Conveyancing Act, 1881, do not pay the funds received by them into Court; but receivers appointed by the Court are officers of the Court, and must pay into Court moneys received by them as receivers at such times as the Court may direct, such direction being contained usually in the order of appointment (R. S. C. Order 50, r. 18, by which rule the penalty for failure to pay in is prescribed).

(8) *Payment in by Liquidators and Trustees in Bankruptcy.*—A liquidator appointed to a winding up under the supervision of the Court may be ordered to pass his accounts before and pay money into Court, in which case the time for payment in will be fixed by order. In compulsory liquidation the liquidator pays into the Liquidation Estates Account, which is under control of the Board of Trade, and the trustee in bankruptcy pays into a similar account styled the Bankruptcies Estates Account.

(9) *Payment in by an Accounting Party.*—As to trustee, see *supra*. Under Order 32, r. 6, the Court makes orders on parties who have admitted that they hold a sum due to other parties to the suit; and any clear admission, whether on the pleading or otherwise, will suffice to ground such an order (see *London Syndicate v. Lord*, 1878, 8 Ch. D. 84; *Hollis v. Burton*, [1892] 3 Ch. 226; *In re Beenev*, [1894] 1 Ch. 499). But such orders ought to be made only when it is proved to the satisfaction of the Court that the defendant has the sum claimed in his hands, and that he has no real defence to the action (per Davey, L.J., in *Neville v. Masterman*, [1894] 3 Ch. at p. 355); in such cases the application may be by originating summons under R. S. C. Order 55, r. 3 d (*Nutter v. Holland*, [1894] 3 Ch. 408). The making of the order is a discretionary power, and cannot be demanded as a matter of right (*In re Wright*, [1895] 2 Ch. 747).

(10) *Miscellaneous Cases.*—Under the Lands Clauses Acts; see LANDS CLAUSES ACTS; under the Copyholds Acts; see the Copyhold Act, 1894 (57 & 58 Vict. c. 48, s. 26), and S. C. F. R. 1894, r. 40; under the Lunacy Acts; see LUNACY; in action against public officers or authorities, see the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61); by the marshal in Admiralty actions; R. S. C. Order 51, r. 15. Payment into Court in County Courts is governed by the County Courts Act, 1888, sec. 107, and the County Court Rules, Order 9, r. 11; the practice is similar to that in vogue in the High Court.

(11) *Solicitor's Lien on Money in Court.*—A solicitor's right to a charging

order on moneys recovered or preserved for his client is dealt with under SOLICITOR; suffice it to say here, that moneys paid into Court may be recovered or preserved within the meaning of the statute authorising the charging order. If it was paid in by the solicitor's own client, and owing to success is repayable to the client, the solicitor probably would not get the charging order (see remarks of Grove, J., in *Pierson v. Knutsford Estates Co.*, 1883, 13 Q. B. D. 666; and per Kay, J., in *In re Wadsworth*, 1884, 21 Ch. D. 517, in which case money paid into Court by a client as security for costs was held free of the solicitor's charge). If the money is not paid in in the action, but in collateral proceedings, e.g. to avoid bankruptcy, the charge will not usually attach (*Pierson v. Knutsford Estates Co.*, *supra*). Money paid into Court as a condition of leave to defend is money recovered or preserved by the plaintiff's solicitor, and cannot be paid out by way of compromise to the plaintiff in fraud of the solicitor's right (*Moxon v. Sheppard*, 1890, 24 Q. B. D. 627); and on the question of collusive compromise, see *Ross v. Buxton*, 1889, 42 Ch. D. 190. A fund paid into Court may be the subject of a charging order in favour of the solicitor, though it be the produce of real estate (*In re Knight*, [1892] 2 Ch. 368). If money is paid into Court as a defence, either with or without a denial of liability and if the plaintiff agrees to take the money in settlement, the solicitor can be given a charge upon it (*Emden v. Carte*, 1881, 19 Ch. D. 311); but if the plaintiff fights and fails to recover any part of the money paid in, or if the defendant succeeds in a counterclaim arising out of some matter connected with the cause of action, the charging order is limited to the balance if any, left in Court to which the plaintiff is entitled (*Westcott v. Bevan*, [1891] 1 Q. B. 774).

(12) *Procedure relating to Payment into Court.*—This is provided for by the Chancery Funds Act, 1872, the Supreme Court of Judicature Act, 1883, and the rules made thereunder bearing the title the Supreme Court Funds Rules, 1894; these will be found set out at length in the *Annual Practice*, vol. ii. ed. of 1898. Under the Act the securities and money paid into Court are vested in the Paymaster-General, an officer who succeeds to the functions of the Accountant-General in Chancery. He holds them for and on behalf of the Supreme Court of Judicature in trust to attend the order of the Court in regard thereto; the Consolidated Fund is liable to make good to suitors the securities and moneys thus paid to the Paymaster-General. Under the rules the payments are to be made to the Bank of England, Law Courts Branch, or, in the case of funds to be lodged in Court in the district registries of the High Court at Liverpool or Manchester, in the branches of the Bank of England situate in those cities; the account to which moneys are to be paid is that of the Paymaster-General; cheques for payment in are to be made payable at the Bank of England, Law Courts Branch, for the "account of the Paymaster-General for the time being for and on behalf of the Supreme Court of Judicature." The details with regard to the paying in and payment out vary with the Division of the High Court in which the action is brought, and with various other circumstances, for which *vide* Supreme Court Funds Rules, 1894, mentioned *supra*. But in every case, speaking generally, before moneys are paid in or paid out, a request must be made to the Paymaster-General for a direction, which direction is taken to the bank and is duly regarded. Payments in or out under an order in the Chancery Division are accompanied by a lodgment or payment schedule in a prescribed form, and containing full particulars, which schedule is the Paymaster's authority to give the requisite direction. In the Queen's Bench Division the order, if any, should be pro-

duced, and if payment in is made under notice or in accordance with the terms of a pleading, the document should be produced. When payment in has been made, the bank should return the direction to the Paymaster, and in the Chancery Division a certificate of lodgment must be filed at the Central Office. The rules contain detailed directions as to sending by post, as to investment of funds, as to allowance of interest on deposit, etc., the details of which can hardly be reproduced in this article.

Pay Office ; Paymaster-General.—*Constitution of Office.*

—By the Supreme Court of Judicature (Funds) Act, 1883 (46 & 47 Vict. c. 29), s. 1, it was provided that from and after the commencement of the Act there should be one accounting department for the Supreme Court of Judicature. All funds in the Chancery Division vested in the Paymaster-General in pursuance of the Chancery Funds Act, 1872, and all funds thereafter to be transferred or paid into Court in that Division were to vest in the Paymaster-General for and on behalf of the Supreme Court of Judicature (s. 2); and power was given to the Lord Chancellor, with the concurrence of the Treasury, to direct that all funds in Court or thereafter to be brought into Court in any other Division of the High Court of Justice should be similarly transferred, paid, or placed to the account or credit of the Paymaster-General for and on behalf of the Supreme Court of Judicature.

Prior to this Act there were in existence various rules and orders regulating the dealings with funds in Court in the several Divisions, there being no uniformity in the procedure, but each Division working on a separate system. Since the passing of the Act of 1883 there has been more than one code of rules on the subject. The present practice and procedure of the Pay Office (which is the term used to describe the Paymaster-General's Office for business of the Supreme Court of Judicature) are regulated and controlled by the Supreme Court Funds Rules, 1894.

The funds brought into Court in the Queen's Bench and Probate, Divorce, and Admiralty Divisions respectively constitute but a very small fraction of the total amount, and represent chiefly moneys paid in with pleadings pursuant to the provisions of the Rules of the Supreme Court. The main portion of the very large funds which are in the custody of the Court have been brought under its charge by orders of the Chancery Division or of the old Court of Chancery, or pursuant to Acts of Parliament which enable funds to be lodged without express order, as, *e.g.*, under the Parliamentary Deposits Act, 1846 (9 & 10 Vict. c. 20). How large a proportion of the total amount is represented by Chancery funds is evidenced by the following figures, extracted from the Judicial Statistics for 1896. In that year, of 84,321 cheques drawn in the Pay Office 79,393 were in actions and matters in the Chancery Division, whilst only 4928 were issued in matters pending in the other branches of the High Court.

The Supreme Court Funds Act, 1883, was but the last stage of a long journey, the whole course of which requires to be surveyed if any adequate idea is to be formed of the various steps by which the present system has been reached. It is the object of the present article to present, however briefly, such a survey for the consideration of the readers of this work.

Accountant-General's Office.—The origin of the present Pay Office must be sought in the history of what was for many years known as "The Accountant-General's Office," and more recently as "The Chancery Pay Office."

From very early times it was the practice of the Court of Chancery to take charge of the funds and effects of its suitors. Originally such moneys and effects were placed in the custody of the Masters in Ordinary, and where there had been no reference of the cause to a Master, in that of the Usher of the Court. Those officers were accountable to the suitors for the principal moneys placed in their hands, but apparently were in the habit of employing such moneys for their own benefit, the advantage arising therefrom constituting a portion of the profit of their offices.

In or about the year 1724 it was discovered that grave irregularities had been committed, and that several of the Masters were defaulters, the total amount of their defalcations exceeding £100,000. The discovery of these frauds resulted in investigations both by the Court and by Parliament. Lord Macclesfield, the then Lord Chancellor, was impeached, and, after a trial extending over thirteen days, was convicted of conniving at the delinquencies of the Masters and of other malpractices, and condemned to pay a fine of £30,000. Certain orders, dated 26th May 1725 and 4th November 1725, were made by the Lords Commissioners of the Great Seal and by the Lord Chancellor, with a view of affording additional securities to the suitors in respect of their funds, under which it was in effect directed that the money and effects of the suitors should be transferred from the custody of the Masters and given into that of the Bank of England. An account was to be kept at the bank and also at the Chancery Report Office causewise, and any dealing with the suitors' money was to be certified at the Report Office.

By an Act, passed in 1726, intituled "An Act for better securing the Moneys and Effects of the Suitors of the Court of Chancery" (12 Geo. I. c. 32), the above-mentioned orders were confirmed, and a new office was created, which was destined to last for close upon one hundred and fifty years. The holder of this office was styled "The Accountant-General of the Court of Chancery." He was to be appointed by the Court, and was to act, perform, and do all such matters and things relating to the delivery of the suitors' money and effects into the bank, and taking them out of the bank, and the keeping of the accounts with the bank, and all other matters relating thereto, as were by the said orders prescribed and directed to be done by the Masters and Usher of the Court of Chancery. An account was to be kept in the name of the Accountant-General with the bank for and on behalf of the suitors, and all securities in the names of the Masters or Usher were to be transferred to him.

Sec. 8 of the Act was in the following terms:—

And to the end that all misapplications or wastings of the subjects' money by any officer of the High Court of Chancery may be entirely prevented for the future, Be it therefore further enacted by the authority aforesaid, that the said Accountant-General shall not meddle with the actual receipt of any of the moneys or effects of the suitors, but shall only keep the account with the bank; and the said Accountant-General, observing the rules hereby prescribed, or hereafter to be prescribed to him by the said Court, shall not be answerable for any moneys or effects which he shall not actually receive; and the Bank of England shall be answerable for all the moneys and effects of the suitors which are or shall be actually received by them.

It will be seen, therefore, that the Accountant-General was not to handle any cash, his business being to keep a correct account with the Bank of England of all dealings and transactions with the suitors' money there effected, upon the authority of the orders of the Court, duly authenticated by directions transmitted by the Accountant-General to the bank.

By another Act of the same year (12 Geo. I. c. 33), intituled "An Act for Relief of the Suitors of the High Court of Chancery," provision was made for satisfying the defalcations of the delinquent Masters by the imposition of a tax on all writs issued throughout England, after applying towards the same object the fine of £30,000 levied on Lord Macclesfield, and the proceeds of the private estates of the Masters. And it was provided that all cash to be paid or deposited in the bank on account of the suitors should be, and be accounted and taken to be, one common and general cash, and should be promiscuously issued, when and as the Court should direct, for answering and paying the debts and demands, if any, of the suitors; and further, that when and so soon as the deficiency of the suitors' money intended to be answered and paid out of the fund thereby established, should have been fully paid and satisfied, the surplus moneys which should have been raised on the authority of the Act should be from thenceforth reserved for the benefit of the public, and should be applied to such uses only as should be thereafter decided by Parliament. It is unnecessary to detail the further steps which were taken, but ultimately the deficiency in the Masters' account was cleared off in 1749.

The successive holders of the office of Accountant-General (with possibly one exception) were Masters of the Court, and received salaries as such in addition to the salary provided by Act of Parliament for discharging the duties of the Accountant-General's office. Each Accountant-General also down to the year 1852 received a certain proportion of the brokerage on sales and purchases of stock sold and bought under order of the Court. By the Court of Chancery Act, 1852 (15 & 16 Vict. c. 87), an end was put to that system, and the Accountant-General was required to pay into Court to the credit of the Suitors' Fee Fund the brokerage received by him, an additional salary being substituted.

The Suitors' Fund.—It has been stated that all moneys paid into Court by the suitors as well as the moneys raised under the provisions of 12 Geo. I. c. 33 formed one common fund. It resulted from this that there was always a large amount of unemployed cash lying to the credit of the account at the bank. Except where the parties requested investment, such cash remained unproductive, the individual suitor being only entitled, when the time for payment came, to receive the exact amount brought in by him without any accretion. In 1739 for the first time, under 12 Geo. II. c. 24, authority was obtained from Parliament to invest £35,000, part of the unemployed balance of cash, certain fixed salaries in lieu of fees being charged on the interest of such investment, and the surplus interest being treated as part of the suitors' general cash. This formed the foundation of what came to be known as the "Suitors' Fund." By subsequent Acts further investments were directed, and ultimately by a general Act (1 & 2 Vict. c. 54) authority was given to the Lord Chancellor to make such investments of the unemployed cash as he might judge to be expedient. Without tracing more minutely the history of the fund, it is sufficient to say that it ultimately reached the sum of £3,160,110, 1s. stock.

Meantime the surplus income on the Suitors' Fund had proved much more than sufficient to satisfy the amounts charged on it for the salaries of officers of the Court, and by another Act of Parliament (9 Geo. III. c. 19), passed in 1768, such ultimate surplus from time to time was directed to be invested to the credit of the "Profit or Accumulation Fund." Notwithstanding very large charges which were from time to time thrown upon the surplus income of both the funds above referred to for building offices of the Court and other purposes, the accumulation account steadily increased. In

the year 1852 it amounted to £1,291,629, 5s. 6d. stock. By the Court Chancery Act, 1852 (15 & 16 Vict. c. 87), s. 53, the surplus income of the two funds was directed to be carried over and added to the "Suitors' Fund Account."

Suitors' Fee Fund.—At a much later date than the "Suitors' Fund" further fund was established, termed "The Suitors' Fee Fund," the origin of which was shortly as follows:—By the Chancery Regulation Act, 1853 (3 & 4 Will. IV. c. 94), certain fees which were formerly payable to certain officers of the Court, and were by them retained for their own benefit, were directed to be accounted for and paid into the bank to the credit of an account in the name of the Accountant-General, under the title of "The Suitors' Fee Fund Account." Various salaries and other payments were charged on this fund, and the surplus was directed to be invested to the credit of an account entitled "Account of Moneys placed out to provide for the Officers of the High Court of Chancery." This latter fund ultimately reached the amount of £201,028, 2s. 3d. stock.

In 1852 payment by salary was by the Court of Chancery Act of that year substituted for payment by fees; all fees were directed to be collected by stamps, of which separate accounts were to be kept, and the money received and collected in respect thereof were to be paid to the credit of "The Suitors' Fee Fund Account."

Under the Suitors' Further Relief Act, 1853 (16 & 17 Vict. c. 98), s. 1 the Lord Chancellor was empowered to direct an investigation into accounts in the name of the Accountant-General, the dividends of which should not have been dealt with for fifteen years and upwards, and, where it was not probable that any claim would be made for the same, to make orders for the appropriation of the future dividends for the benefit of the suitors of the Court, and for carrying over the same to "The Suitors' Unclaimed Dividend Account," and for carrying over such part of the cash from time to time standing to the credit of such last-mentioned account as he should think proper to "The Suitors' Fee Fund Account."

Both the Suitors' Fund and the Suitors' Fee Fund were to some extent under the supervision of an officer, who was termed "The Solicitor to the Suitors' Fund." His duties were to protect the funds, and inquire into and check all claims for payment thereof (see OFFICIAL SOLICITOR).

By the Courts of Justice Building Act, 1865 (28 & 29 Vict. c. 48), the sum of £1,000,000 stock was, in accordance with the recommendations of the Commissioners for the Concentration of Courts, 1860, contributed out of "The Accumulation Fund" (termed in the Act "The Surplus Interest Fund"), towards the cost of erection of the Royal Courts of Justice; the Consolidated Fund being made liable to the same extent to satisfy the demands of the suitors, if the general cash balance remaining in the Court of Chancery should at any time be insufficient for the purpose.

Finally, by the Courts of Justice (Salaries and Funds) Act, 1869 (32 & 33 Vict. c. 91), the then balances of the Suitors' Fund and Suitors' Fee Fund respectively were transferred to the National Debt Commissioners, the security of the Consolidated Fund being given to the suitors in the event of there proving to be a deficiency in the funds standing to their credit.

Chancery (Funds) Act, 1872.—In the year 1872 the office of Accountant-General was abolished by the Chancery (Funds) Act, 1872 (35 & 36 Vict. c. 44), which provided that the Paymaster-General for the time being should perform all the duties and exercise all the powers and authorities which before the Act were performed by or vested in, or capable of being

exercised by, the Accountant-General of the Court of Chancery (s. 4); and the Consolidated Fund was made liable to the suitors for any default of the Paymaster-General in satisfying any order of the Court for payment of any money or transfer of any stock (s. 5). See, as to this section, *Slater v. Slater*, 1888, 58 L. T. 149; *Marsh v. Joseph*, [1897] 1 Ch. 213.

By the same Act (s. 8) it was enacted that the Treasury should cause the Paymaster-General to keep in the neighbourhood of the place where the Court of Chancery ordinarily holds its sittings an office for the purpose of carrying on Chancery business. In pursuance of that provision the old and familiar title of "The Accountant-General's Office" was changed to that of "The Chancery Pay Office," a title which has in turn been displaced by its present designation, "The Pay Office of the Supreme Court." The principal features of the Chancery (Funds) Act, 1872, were, in the Report of the Legal Departments Commission, 1874, stated to be as follows:—

1. The establishment of the suitors' deposit account, bearing interest at £2 per cent. per annum, to which, unless otherwise specially directed, all moneys paid into Court shall be placed, the former practice having been not to invest any of the moneys of the suitors in securities bearing interest for their benefit except at the request of the suitor himself.

2. The conversion into cash, when deemed expedient, of securities standing to the credit of the Paymaster-General, on behalf of the Court of Chancery, and the carrying such cash to the deposit account. Where such securities are Government securities, they are to be transferred to the National Debt Commissioners, unless otherwise directed by the Court.

3. The transfer to the National Debt Commissioners of any moneys standing to the credit of the Paymaster-General, on behalf of the Court of Chancery, beyond the amount he may deem required for current demands.

4. The investment of such moneys by the Commissioners in Government securities, the dividends whereon, and on the securities directly transferred to them, as well as the principal thereof, are applicable to meeting the demands of the Paymaster-General.

5. The establishment of an audit by the Comptroller and Auditor-General of the accounts of all transactions under the Act by the Paymaster-General and the National Debt Commissioners.

The establishment of the deposit account has proved a great boon to the suitors of the Court, as under it their funds become entitled to interest as soon as they are lodged in Court, and that without any request for the purpose being necessary.

Pursuant to the Act the Chancery Funds Consolidated Rules, 1874, and the Chancery Funds Amended Orders, 1874, were passed, which regulated the procedure of the Chancery Pay Office until the rules under the Supreme Court (Funds) Act, 1883, appeared.

Supreme Court (Funds) Act, 1883.—The present practice of the office is regulated by the Supreme Court Funds Rules, 1894, which contain a very complete code of procedure in connection with the various operations which take place in the Pay Office.

The Act of 1883, in addition to creating one accounting department for the whole of the Supreme Court, contained provisions authorising the Paymaster-General to act in pursuance of any rules of the Supreme Court (s. 5), enabling remittances to be made by post (s. 6), and enabling the sale or transfer of securities upon such evidence as should be fixed by rules made by the Lord Chancellor with the concurrence of the Treasury. The result of this latter provision has been to abolish the certificate of the registrar, which was formerly required under the Chancery Funds Act,

1872 (s. 10), before a sale or transfer could be made by the Paymaster-General.

The passing of the Act was followed by the promulgation of a set of rules, known as "The Supreme Court Funds Rules, 1884," subsequently displaced by "The Supreme Court Funds Rules, 1886," which in their turn had to give way to the present code.

The rules introduced some changes of importance in the practice of the Pay Office; but probably none has proved more beneficial, or has conducted more to the speedy despatch of business, than that which regulates the form of money-orders in the Chancery Division. Formerly it was necessary that the order itself should be left with the Paymaster, who had to peruse and spell out from the midst of what were often very complicated provisions so much of it as related to dealings with the funds in Court. In 1864 the Chancery Funds Commissioners recommended that, instead of being required to act upon the original order, the Accountant-General should be furnished with and act upon pay sheets or abstracts in a tabular form, prepared at the registrar's office, for the accuracy of which the registrar should be responsible. In effect the present system carries out this recommendation, for the rules provide that every order in the Chancery Division or in lunacy which provides for funds being brought into or paid out of Court, shall contain lodgment or payment schedules, or both, as the case may be, which are to constitute the sole instructions on which the Paymaster acts (S. C. F. R. 1894, rr. 5-27).

All orders in the Chancery Division for the payment or transfer of money or securities into Court to the credit of the Paymaster-General, and for the payment or transfer of money or securities out of Court by the Paymaster-General, are to be drawn up in conformity with such rules relating thereto as shall from time to time be made under the Court of Chancery (Funds) Act, 1872, or any Act amending the same (R. S. C. 1883, Order 62, r. 16).

Considerations of space make it impossible to enter into any detailed examination of the rules of 1894. They supply very full and complete directions as to the various operations in the Pay Office, which comprise the following matters:—(1) Lodgment of funds in Court; (2) payment, delivery, and transfer of funds out of Court; (3) payment of dividends; (4) investment of funds; (5) placing money on deposit, and interest thereon; (6) exchange and conversion of Government securities, and transactions with the National Debt Office; (7) calculation of residue and evidence of life, etc.; (8) miscellaneous provisions.

The rules apply to funds in Court in the district registries in Liverpool and Manchester (r. 111), and for the purposes of those registries the term "bank" includes the branch banks of the Bank of England in Liverpool and Manchester.

Investment of Cash under Control of Court.—In Order 22, rr. 17, 17a the Rules of the Supreme Court, 1883, provisions are contained as to the mode of investment of cash under the control of or subject to the order of the Court. See CONTROL AND CUSTODY OF THE COURT.

Dormant Funds.—It is the duty of the Paymaster, on or before the 1st day of March in every third year, to prepare a list of the accounts in the books to the credit of which there stood on the preceding 1st day of September any funds not less than £50 which have not been dealt with otherwise than by the continuous investment, or placing on deposit of dividends during the fifteen years immediately preceding. The list is to be filed in the Central Office, and published in the *London Gazette* (S. C. F. R. 1894, r. 101). See further, DORMANT FUNDS.

Growth of Business.—A few figures will suffice to show by what leaps and bounds the business of the department has developed. In 1726, the year in which the office of Accountant-General was established, the number of accounts in the books was 415, to the credit of which stood stocks and securities amounting to £589,553, 14s., and cash, £152,037, 4s. 6d. These modest figures rapidly increased with the increasing wealth and prosperity of the country. In 1800, £16,888,259, 3s. 8d. stocks and securities, and £677,652, 19s. cash represented the total of 4744 accounts. The Judicial Statistics for 1896 show a grand total of 44,725 accounts open in the books, with balances of stocks and securities (exclusive of securities in foreign currencies) amounting to no less than £54,826,102, 15s. 9d., and cash, £3,485,889, 11s.

When the Accountant-General's Office was first created, two clerks appear to have been sufficient for the work. In 1864 there were thirty-five clerks; in 1874 the number had increased to forty-three. At the present time the staff of the department consists of the Assistant Paymaster-General, the Deputy Assistant Paymaster-General, five chief clerks, and sixty other clerks.

It is unquestionable that very much has been done of recent years to simplify the work of the office, and to increase the facilities for the smooth and easy despatch of business. Under the old system the office was closed during the whole of the long vacation. It is now open on every working day in the year. The delays in the Accountant-General's Office under the *régime* of the old Court of Chancery were proverbial. No similar reproach attaches to the Pay Office of the Supreme Court.

[*Authorities.*—Evidence of Mr. S. Parkinson before Select Committee of the House of Commons on Fees in the Courts of Law and Equity, 1848; Report of Commission on Concentration of Courts of Law and Equity, 1860; Report of Chancery Funds Commissioners, 1864; Second Report of Legal Departments Commissioners, 1874; Howell's *State Trials*, vol. xvi. pp. 767–1402; Field and Dunn on *Chancery Funds Act*, 1872; Mackenzie and White on *Supreme Court Funds Rules*, 1884; Daniell's *Chancery Practice*, 6th ed., 1884, ch. xxix.; Seton's *Judgments and Orders*, 5th ed., 1891, ch. xvi.]

Peace, Bill of.—The bill of peace was the mode of seeking equitable relief when it was desired to definitely establish rights against numerous persons and avoid future controversy. “By a bill of peace we are to understand a bill brought by a person to establish and perpetuate a right which he claims, and which from its nature may be controverted by different persons at different times and by different actions; or where several attempts have already been unsuccessfully made to overthrow the same right, and justice requires that the party should be quieted in the right if it is already sufficiently established” (Story, *Eq. Jurisprudence*, English ed., 567). Its name, “bill of peace,” sufficiently indicates its obvious purpose—the securing for the person that brings the bill repose from continual litigation; and relief is granted on the well-settled principle of the Courts that multiplicity of suits is against public interest, and must be checked.

Accordingly, where a man sets up a general exclusive right, and the persons who controvert it are very numerous, and he cannot by one or two actions at law “quiet” that right, if he goes to a Court of Equity the Court will direct an issue to determine the right, as in disputes between lords of manors and their tenants, or tenants of one manor and another; for in all

these cases there would be no end of bringing actions for trespass, each action determining only the particular right in question between the plaintiff and defendant (*Lord Tenham v. Herbert*, 1742, 2 Atk. 483). The Court will in such cases grant a perpetual injunction.

Instances of cases, besides those above noticed, to which a bill of peace has been held applicable, are rights of common, rights of fishery, and claims for tolls or profits of a fair. See, for illustrative cases, *Mayor of York v. Polkington*, 1 Atk. (where right of fishery enjoyed by Corporation of York and constantly exercised by them had been from time to time opposed by different lords of manors); *Merreit v. Eastwicke*, 1 Vern. 266; 1 Abr. Ca. Eq. 79 (claim by several tenants to profits of a fair); *New River Co. v. Graves*, 2 Vern. 398 (bill to quiet the company in possession of pipes laid through the defendant's grounds).

Another class of cases where the Courts of Equity have granted relief, is where the plaintiff has repeatedly established his right, at law against various parties; the jurisdiction of equity in this respect was at first subject to some doubt, but was clearly enunciated by the House of Lords in the case of *Lord Bath v. Sherwin*, Ch. Prec. 26, this being a case where the plaintiff had previously won five separate actions for ejectment.

On the other hand, the Courts have refused to entertain bills of peace for the purpose of settling boundaries (*e.g.* of two manors or two parishes); or again where the right is in dispute between two persons only (*e.g.* bill by one tenant of a manor claiming a right by custom on behalf of tenants of his manor against those of another manor). And in no case will the Court decree a perpetual injunction to protect a party against a public right (*e.g.* where a party claims an exclusive right to a highway). But a bill will lie by plaintiff to be quieted in possession of a common.

The bill usually prayed not only for special relief, viz. that the plaintiff be quieted in his possession of the premises, etc., but also for general relief in the premises, and for a perpetual injunction.

The modern statement of claim now takes the place of the old bill of peace, and the same relief may be asked for.

A precedent of an order establishing the right to an oyster fishery, and "quieting" the plaintiff in possession, will be found in Seton on *Judgments*, 628; also a claim for declaration and perpetual injunction. And for a more modern case on the subject, see *Sheffield Waterworks Co. v. Yeomans*, 1866, L. R. 9 Ch. 8, where it was held that where a large number of persons have similar (though not identical) claims against a party he can, by a bill filed against some of them, restrain the proceedings of all until the question as to the validity of the claims has been decided; for, the rights of the numerous claimants all depending upon the same question, such an action, even if not, strictly speaking, a bill of peace, is clearly within the principle of such bills. And such a case is a fit one for a Court of Equity to interpose (by analogy at least to bills of peace) and prevent the unnecessary expense and litigation which would be occasioned by not deciding once for all the question upon which the validity or invalidity of all the claims depends (see Story's *Eq. Jurisprudence*, *loc. cit.*; Seton on *Judgments*, pp. 628-630; Maddock's *Practice of Chancery*, vol. i. p. 166, "Bills of Peace," where the old cases are collected).

Peace, Breach of.—1. Under the Saxons and Danes in England was established a kind of mutual insurance system, known as "frith borgh," or "peace pledge," whereby feuds or quarrels arising out of manslaughter or

other wrongs were settled or compounded by the friends of the offender, *i.e.* social or communal responsibility was created, in substitution for that of the individual (1 Pike, *Hist. Crim.* 57, 438). After the Conquest, as a means of strengthening this system with a view to obtaining better security for peace, every freeman was required to be in a tithing (*in decennā*) responsible for his good behaviour, and a vow of FRANKPLEDGE was taken twice a year to see that the law was complied with. The system was not effective, and in the reign of Henry III. and Edward I. was supplemented by provisions establishing constables, and setting up watch and ward for highways and towns; a system which, with most of its defects, continued into the present century, till the establishment of the police (see CONSTABLE; HEAD BOROUGH; POLICE).

From the Conquest there was also gradually developed, with the improvement in the administration of the law, a conception of "the peace," as representing the state of law and order required by the superior of the realm, or the county or the manor; and breaches of the law or custom of such areas came to be described as "breaches of" (or as "against the peace of") the king, the sheriff (1 Seld. Soc. Pub. 21), or the lord of the manor (1 Seld. Soc. Pub. 192). That the peace of the king means his law and sovereignty is clear from an entry of 1201 (1 Seld. Soc. Pub. 84), which speaks of an event "after the peace of our lord the king, then Duke of Normandy and Lord of England, was sworn," referring to the end of the interregnum between the death of Richard I. and accession of John. The Crown or central executive, gradually gaining strength, drew to itself, or treated as offences *contra pacem regis*, all wrongful acts of public concern; and by the system of circuits and presentments, coupled with amercements for not presenting, acquired for its justices in eyre cognisance of all those matters which may be summarised as pleas of the Crown; and with the abolition of the right of the sheriff to hold pleas of the Crown, this process became complete, and the scope of the commissions of the justices in eyre was widened accordingly (1 Seld. Soc. Pub. 20). Besides the itinerant officers of the Crown, there were established resident officers—first by writ, described as conservators of the peace, and subsequently under statute—as justices of the peace (see JUSTICE OF THE PEACE; COMMISSION OF THE PEACE).

All persons within the king's peace were and are entitled to the protection of his laws and officers, and correlatively are bound to respect them. In this wide sense every breach of the public law of the land is a breach of the peace, and is so described in an indictment.

2. In the narrower sense, breach of the peace is often used to denote some violent or disorderly act causing public alarm or disturbance, and not a mere technical breach of the peace (1 Russ. *Cr.*, 6th ed., 194). In this sense it is not a distinct offence, but a mode of describing certain classes of offences with reference to the power of ARREST, and swearing the peace or binding over to good behaviour. See ARREST; ARTICLES OF THE PEACE.

Peace, Clerk of.—*Appointment.*—The office of clerk of the peace has existed as long as the commission of the peace, and till 1545 the appointment was made by the *custos rotulorum*, as responsible for the records of sessions, and the clerk was his deputy. Abuses seem to have arisen by obtaining grants for life to incompetent persons; and the mode of appointing the *custos rotulorum* was then altered (37 Hen. VIII. c. 1), except in certain liberties and franchises (s. 4). It was made during pleasure;

and the clerk was required to discharge his duties personally, or by his sufficient deputy learned in the laws of the realm and able to supply the said office (s. 1). Abuses seem again to have crept in; and in 1688 (1 Will. & Mary, c. 21) the *custos rotulorum* was required to nominate and appoint an able and sufficient person resident in the county, to hold office and act by himself, or sufficient deputies, during good behaviour (s. 4). The justices of the peace are empowered to discharge the clerk for misconduct, after inquiry at Quarter Sessions; and in such a case a new clerk was appointed by the *custos rotulorum*, or, on his default, by the justices (ss. 5, 6). Buying or selling the office, or taking a fee on appointment, is forbidden (s. 7); and the clerk, on appointment, has to make a declaration on the subject (s. 8 31 & 32 Vict. c. 72).

The mode of appointment in counties was altered in 1888 (51 & 52 Vict. c. 41), and it is now made, not by the *custos rotulorum*, but by the standing joint committee of the county justices and the county council (s. 83). From 1864 till 1888 there existed, besides the power of 1688, a power to remove a clerk of the peace for unofficial misconduct, subject to appeal to the Lord Chancellor (27 & 28 Vict. c. 65). But it seems to be superseded (as to all clerks appointed since 13th August 1888) by the power of removal given to the county joint committee by sec. 83 of the Act of 1888 and was repealed in 1893 (56 & 57 Vict. c. 54).

In Quarter Sessions boroughs (see 51 & 52 Vict. c. 41, s. 119), whether county boroughs or not, the clerk of the peace is appointed during good behaviour by the town council (45 & 46 Vict. c. 50, s. 164 (1) (2)).

The clerk of the peace of a county or borough cannot be clerk to justices either of the county or any borough situate in it (40 & 41 Vict. c. 43, s. 7; 45 & 46 Vict. c. 50, s. 159). Under 22 Geo. II. c. 46, s. 14, he was forbidden to act as a solicitor before his Court. The Act is repealed but breach of so obvious a rule of conduct would be ground for removal. In boroughs he can appoint a deputy in case of his illness, incapacity, or absence (45 & 46 Vict. c. 50, s. 164 (3)). Where, from illness, absence, or any other cause, he is unable to make the appointment, the town council can make it (51 & 52 Vict. c. 23, s. 1).

In counties the deputy is appointed by the standing joint committee (51 & 52 Vict. c. 41, s. 83 (4)).

A county clerk of the peace may not sit in Parliament if required to give his whole time to his employment (51 & 52 Vict. c. 41, s. 83 (13)).

Clerks of the peace and their deputies are exempt from service on juries.

Duties.—The duties of the clerk of the peace fall under three heads.

1. As representative of the *custos rotulorum*, he has charge of the county records. Under the Local Government Act, 1888, he has charge of and is responsible for, the administrative and judicial records of the county subject to the directions of the *custos rotulorum*, or the Quarter Sessions, or the County Council, according to the nature of the documents (s. 83 (3)). In boroughs the custody of many such documents is in the town clerk.

2. So long as justices or Quarter Sessions had the administration of their counties, the clerk of the peace was their chief officer. On the transfer of these functions to County Councils, the clerk of the peace became clerk to the County Council, except in the county of London. In those counties which have been formed into two or more administrative counties, *vide* Lincoln, Northampton, and Yorkshire, there is a clerk of the peace (who is also county clerk) for each division. Suffolk and Sussex have each only one commission of the peace, but the clerkship of the peace, while a separat

office for each administrative county, may be held for both divisions by the same man (51 & 52 Vict. c. 41, s. 83). On the creation of County Councils, contracts entered into with the clerk of the peace, and property vested in him on behalf of the county, passed over to the Council (51 & 52 Vict. c. 41, ss. 64, 79 (3)). The clerk of the peace has the duty of sending to the Secretary of State or Local Government Board any accounts or returns required by either House of Parliament (51 & 52 Vict. c. 41, s. 83 (13)). The clerk of the peace has to receive plans deposited by promoters under special Acts authorising the taking of land compulsorily for the purposes of national defence, or municipal or industrial undertakings (7 Will. IV. c. 83; 8 & 9 Vict. c. 20, s. 9). He has also to receive the jury lists under the Juries Acts of 1825 (6 Geo. IV. c. 50, s. 12), 1862 (25 & 26 Vict. c. 107, ss. 9, 10), and 1870 (33 & 34 Vict. c. 77, s. 25). He has also to receive the corrected lists of parliamentary and local government electors prepared at the annual Revision Court, and to print and distribute them. The property, trustees, and objects of charities must be registered with the clerk of the peace (under 52 Geo. III. c. 102; 51 & 52 Vict. c. 41, s. 3).

In the exercise of his duties with respect to these matters, the clerk is now under the control of the County Council, and not of Quarter Sessions (51 & 52 Vict. c. 41, s. 83 (6)).

3. The clerk of the peace has the same position in the judicial business of a Court of Quarter Sessions that the clerk of the Crown or of assize has in a Court of Assize. He prepares the indictments, so far as that is not undertaken by private enterprise, calls over the panel of grand and petty jurors, swears the juries, receives the bills when found, arraigns the accused, charges the jury with them, and receives the verdict (*Archbold, Quarter Sessions*, 5th ed., 82).

Where a second Court is formed, the clerk appoints a deputy to act for him in it (21 & 22 Vict. c. 73, s. 9; 45 & 46 Vict. c. 50, s. 168).

He is the proper officer to receive fines imposed, and to make up the rolls of estreats (see *ESTREATS*; *FINE*). His duties extend to fines imposed by coroners (50 & 51 Vict. c. 71, s. 19); and he is entitled to have returns sent to him monthly of penalties imposed and paid in petty sessional divisions of his county or borough (11 & 12 Vict. c. 43, s. 31).

He is also the taxing officer of the Court with respect to the taxing of costs payable out of the county or borough rate; and may also be required to tax solicitors' bills relating to the business of parish and district councils and guardians of unions (7 & 8 Vict. c. 101, s. 39; 38 & 39 Vict. c. 55, s. 249).

His duties also extend to attendance on the Court on the hearing of appeals; in which any costs ordered to be paid are paid to him (11 & 12 Vict. c. 43, s. 27). Costs on these appeals must be taxed during sessions, unless the parties by written minute otherwise agree (*Midland Rwy. v. Edmonton Guardians*, [1895] 1 Q. B. 357; App. Cas. 485).

The clerk also must attend the County Licensing Committee, a *quasi-judicial* tribunal.

Duplicates of the warrants of the appointment and declaration of office of sheriffs and ex-sheriffs and coroners are filed with him.

Salary and Fees.—Tables of fees to be taken by clerks of the peace in county or borough Quarter Sessions are fixed by the justices and certified by a Secretary of State, and published by being affixed in the Court. It is illegal to receive any other or higher fees (57 Geo. III. c. 91, ss. 2, 3, 4; 11 & 12 Vict. c. 43, s. 30; 45 & 46 Vict. c. 50, s. 164).

To these tables must be added the special fees imposed by 30 & 31 Vict.

c. 35, s. 5, and 32 & 33 Vict. c. 89, s. 10; and under sec. 28 of the S. J. Act, 1879.

Clerks appointed since 1851 are as a general rule paid by salary instead of fees, subject to power in the justices to except certain fees in computing the salary (14 & 15 Vict. c. 55). Since 1888 the standing joint committee in counties settles the amount of salary, and the fees, if any, to be excluded (51 & 52 Vict. c. 41, s. 83 (5)). Where the clerk is paid by salary, the fees must be accounted for, and a return made to the county treasurer (14 & 15 Vict. c. 55, s. 11). The provisions for compensating for loss of fees consequent on this change (18 & 19 Vict. c. 126, s. 18; 32 & 33 Vict. c. 89, s. 11) seem to be spent.

[*Authority*.—Archbold, *Quarter Sessions*, 5th ed., by Baker, 1898.]

Peace, Commission of the.—See COMMISSION OF THE PEACE.

Peace, Justice of the.—See JUSTICE OF THE PEACE.

Peace, The.—It is difficult to say whether the use of this term in English law is to be traced to an Anglo-Saxon, or a Roman, or a combined origin. The great conceptions of the *Pax Romana*, followed by that of the *Pax Dei* or *Pax Ecclesiæ*, may have contributed in the hands of clerics to give a continental form to the expression in English law; but it is clear that before the Conquest there had been developed a conception of the peace of the king, sheriff, lord, even householder, and of each minister, or parish church (Pollock and Maitland; 2 *Hist. Eng. Law*, 452). After the Conquest the notion developed with the growth of royal supremacy, till the peace of the king became the one peace to be kept, and those of the Church and the sheriff and minor lordships waned, and with the reign of Henry VIII. may be said to have been relegated to history. So far as England is concerned, the term peace meant the right of the person whose peace it was spoken of to have persons under his privilege or protection, respected and not interfered with in liberty or property. It has now grown almost to mean the supremacy of the Crown as protector of public order and individual liberty, *i.e.* the privilege and protection are now those of all persons not alien enemies who are within the realm.

[*Authorities*.—See Pollock ("The King's Peace"), *Oxford Lectures*; 2 Pollock and Maitland, *Hist. Eng. Law*, 452, 461.]

Peculiar.—"A peculiar is a district which is exempt from the jurisdiction of the ordinary of the diocese" (Dr. Phillimore, note to *Aughtie v. Aughtie*, 1810, 1 Phillim. 201), practically abolished by recent legislation. "There were, as appears from the Report of the Ecclesiastical Commissioners of 15th February 1832, p. 21, upwards of three hundred of such special ecclesiastical jurisdictions in England, including royal peculiars, of which there were eleven. The Commissioners recommended the abolition of all peculiars" (Chitty, J., *Combe v. De La Bere*, 1882, 22 Ch. D. 316, 328). In accordance with this recommendation, the Commissioners were given statutory powers to prepare schemes for transferring peculiars to the jurisdiction of the bishop of the diocese

within which they were situated, which were to be confirmed by Order in Council (1836, 6 & 7 Will. IV. c. 77, s. 10; 1850, 13 & 14 Vict. c. 94, s. 24). This was done with all parishes and places locally situated in the dioceses (*inter alia*) of Canterbury and London by Order in Council of 8th August 1845, excepting the cathedral churches, royal residences, and churches or chapels founded therein or annexed thereto, including the Collegiate Church of St. Peter's, Westminster. Certain peculiars have been abolished by statute, *e.g.* St. Margaret's and St. John's, Westminster (1840, 3 & 4 Vict. c. 113, s. 29; *Combe v. De La Bere*, above), and the deanery of St. Burian in Cornwall (1850, 13 & 14 Vict. c. 76, s. 5).

There were various kinds of peculiars. "The word *primâ facie* is to be understood of him who has a co-ordinate jurisdiction with the bishop; there are (1) peculiars of archdeacons, which are not strictly peculiars, but are subject to the bishop of the diocese; (2) peculiars not subject to the ordinary, but to the archbishop; (3) peculiars subject neither to the ordinary nor to the archbishop" (Lord Holt, C.J., *Johnson v. Ley*, 1695, Skin. 589). "The term 'peculiar' *ex vi termini* supposes an exemption from ordinary jurisdiction. They are called exempt jurisdictions, not because they are under no ordinary, but because they are not under the ordinary of the diocese, but have one of their own. . . . There are some more highly exempt than others, royal peculiars, which were anciently exempt from the jurisdiction not only of the diocesan, but of the archbishop also, and which were immediately subordinate to the See of Rome. By 25 Hen. VIII. c. 21 these were placed under the jurisdiction of the Crown, and by 25 Hen. VIII. c. 19 appeals from them lie directly to the King in the High Court of Delegates (now Privy Council). The more common kind of peculiars are those in which the bishop has no concurrency of jurisdiction, and which are exempt from his visitation. These have their appeals directly to the archbishop, and not to the diocesan within the circle of whose diocese they are locally situated. There is a third kind of peculiar, which is subject to the bishop's visitation, jurisdiction, and sentence, and appeal goes from the peculiar to the diocesan (Sir J. Nicholl, *Parham v. Templer*, 1820, 3 Phillim. 242). Burn classifies peculiars as "(1) royal, or the King's free chapels (such as the Chapel Royal, St. George's, Windsor, and Westminster Abbey); (2) peculiars of archbishops, which sprung from a privilege they had to enjoy jurisdiction in such places where their seats or palaces were, and there are more than a hundred of these in the Province of Canterbury, and their jurisdiction is administered by several commissaries, the chief of whom is the Dean of the Arches for the thirteen peculiars in the City of London; (3) peculiars of bishops, *e.g.* the Bishop of London has four in the diocese of Lincoln, and a bishop may exercise episcopal jurisdiction in a house which he has in the diocese of another bishop; and a bishop may have a peculiar in his own diocese exclusive of archidiaconal jurisdiction, such as religious houses by the ancient canon law; (4) peculiars of deans, deans and chapters, prebendaries (and canons, rectors, and vicars—Stephens, *Ecclesiastical Statutes*, i. 249, 250), these being places where by ancient compositions bishops have parted with their jurisdiction as ordinaries to these societies (Burn, *Eccles. Law*, "Peculiar"); and so there may be peculiars of archdeacons which are exempt from the jurisdiction of the bishop, and appeal from all these goes to the archbishop (*Johnson v. Ley*, above; *Robinson v. Godsalve*, 1696, 1 Raym. (Ld.) 123). Peculiars of deans, though they have power to appoint commissaries for probate of wills and ordinary administration of justice, yet are subject to the triennial visitation of the bishop (Stephens, above). Peculiars

belonging to monasteries were put under the jurisdiction (as well as visitation, to which they were subject before) of the ordinary of the diocese wherein they were interested, or such ordinary as the king should appoint, by 31 Hen. VIII. c. 13" (Burn, above).

Such peculiars exercised all the ecclesiastical jurisdiction in respect of probate of wills of personalty, intestacy, and grant of marriage licences; and they have still the right to exercise the latter power, concurrently with the bishop of the diocese (1847, 10 & 11 Vict. c. 98, s. 5).

The Court of Peculiars was the Court exercising jurisdiction over certain peculiars of the Archbishop of Canterbury, viz. thirteen parishes, including Bow, and the deaneries of Croydon and Shoreham; and the judge of it was the Dean of the Arches. In the other peculiars of the diocese of Canterbury the jurisdiction was exercised by commissaries, from whose sentence an appeal lay to the Court of Arches, as the Court of the official Principal of the Archbishop or Dean of the Arches (Dr. Phillimore, note to *Aughtie v. Aughtie*, 1810, 1 Phillim. 201; *Fagg v. Lee*, 1873, L. R. 4 Ad. & Ec. 135). Proceedings in the Peculiars Court were regulated by statute in 1829 (19 Geo. IV. c. 53). An appeal lay from the Dean of the Arches to the official Principal of the Arches Court of Canterbury, but in practice both offices were held by the same person. No dean is now appointed. See PROVINCIAL COURTS.

The exemption enjoyed by peculiars from the jurisdiction of the ordinary is now largely abolished. Formerly no exemption granted to persons under the degree of bishop extended to allowing them to employ any bishop they could procure to perform for them merely episcopal acts, without special words to that effect in the exemption; but all such acts had to be performed by the bishop of the diocese within which the peculiar was situate, *e.g.* in granting letters dimissory, consecrating or reconciling churches and churchyards (Burn, *Peculiar*), and in cases of heresy, the bishop had sole jurisdiction (Phillimore, *Eccles. Law*, 927). In the time of Henry VIII. and Edward VI. the Ecclesiastical Commissioners recommended that the bishop's power with regard to discipline should extend to peculiars, and that their contentious and voluntary jurisdiction should be abolished; and the Act of Uniformity (1558, 1 Eliz. 2) empowered bishops and their officers to proceed, for the purpose of enforcing the Act, in places otherwise exempt from their jurisdiction. In 1838, under the Act for abridging pluralities and better providing for benefices, archbishops and bishops were given jurisdiction, for the purposes of the Act, over all peculiars in their province or diocese, and all concurrent jurisdiction was abolished (1 & 2 Vict. c. 106, ss. 108, 109). By the Church Discipline Act (1840, 3 & 4 Vict. c. 86) all proceedings against clerks in holy orders must take place before the bishop of the diocese, and all places formerly exempt and peculiar are made subject, for purposes of the Act, to the ordinary of the diocese wherein they are situated (ss. 2, 22); and by the above Act of 1847 (10 & 11 Vict. c. 98, an annual Act, but continued yearly) the bishop of every diocese, by himself or his officers, exercises jurisdiction throughout his diocese. By the Ecclesiastical Leasing Act of 1842 (5 & 6 Vict. c. 27, s. 6), bishops having jurisdiction over peculiars may execute in those peculiars the powers given by the Act to the bishop of the diocese; but where there are peculiars not belonging to any bishop or archbishop, such powers are to be executed by the bishop of the diocese in which such peculiars are locally situate.

[*Authorities*.—Phillimore, *Eccles. Law*, 2nd ed.; Stephens, *Laws of the Clergy*, and *Ecclesiastical Statutes*; Burn, *Ecclesiastical Law*.]

Peculiars, Court of.—See PECULIAR.

Pecuniary Causes.—So styled are those injuries to private persons or individuals which are cognisable in the ecclesiastical Courts, not for the purpose of reforming the offender, as in the case of immorality, but for the purpose of making satisfaction to the party injured for the damage sustained. Blackstone (3 *Com.* 88) distinguishes them from MATRIMONIAL and TESTAMENTARY CAUSES. The chief pecuniary causes arise from the subtraction or withholding of tithes from the parson or vicar, the non-payment to the clergy of ecclesiastical dues, such as pensions, mortuaries, compositions, and the like, and the doing or neglecting to do acts relating to the Church whereby damage is caused. As to the subtraction of tithes, cases of that description will now be rare; for by the 7 & 8 Will. III. (1695) c. 6, as extended by 53 Geo. III. (1813) c. 127, s. 4, tithes of a less value than £10 are recoverable summarily before justices, and under 6 & 7 Will. IV. (1836) c. 71 money payments have been almost universally substituted for payments in kind. Also it has always been the rule that whenever the right to tithes is called in question, unless between spiritual persons, the action must be tried in the common law Courts, as the temporal inheritance and real property would be affected (2 *Co. Inst.* 364, 489, 490; 2 *Roll. Abr.* 309, 310). But tithes below the value of £10 cannot be sued for in the common law Courts (5 & 6 Will. IV. (1835) c. 74). Actions for pensions, mortuaries, compositions, offerings, surplice fees, etc., are also now rarely brought in the ecclesiastical Courts, for if below the value of £10 they are recoverable summarily before justices (7 & 8 Will. III. (1695) c. 6; 53 Geo. III. (1813) c. 127). So, too, if the dues claimed are contrary to the common law, prohibition will issue against the spiritual Courts dealing with the matter (*Dean and Chapter of Exeter's case*, 1705, Salk. 334; *Bishop of St. David's v. Lucy*, 1698, 1 Raym. (Ld.) 447; *Burdeaux v. Lancaster*, 1697, Salk. 332).

Other pecuniary causes cognisable in the ecclesiastical Courts are: in respect of fees settled and acknowledged to be due to the officers of such Courts, though not where the right thereto is called in question; in respect of a licensed curate's salary, though not if he is not licensed, or is under some special agreement with the rector; in respect of spoliation, or the taking of the profits of a benefice by a clergyman having no title thereto; and in respect of dilapidations. As to curates' salaries, the 1 & 2 Vict. (1837) c. 106 now provides for the allotment of these by the bishop, and by sec. 90 any agreement by a curate to take less than the salary so allotted is void. Payment of such salaries is enforced by monition and sequestration of the profits of the benefice, issued by the bishop on the application of the curate. As to spoliation, the remedy is a decree to account for the profits wrongfully taken. Incidentally other questions may be decided, as, for example, if a patron makes two presentations to the same living, the presentee not in possession may sue on the ground of spoliation, and the result will determine the validity of the appointment. But if the right of patronage be in question, the ecclesiastical Courts will have no jurisdiction. As to dilapidations, see DILAPIDATIONS, ECCLESIASTICAL.

Pecuniary Consideration.—It is an established principle of English law that all contracts not under seal must be supported by some existing valuable consideration, that is to say, money or money's worth or

marriage, otherwise they will not be enforced. Marriage, however, is not money's worth (at all events within the Succession Duty Act, 1853, 16 & 17 Vict. c. 51, s. 17; *Floyer v. Bankes*, 1863, 33 L. J. Ch. 1). What follows will therefore be confined to the case of money or money's worth. A primary question is as to how far such consideration must be adequate; and here the rule is that, in simple contracts or promises, the value or extent of the consideration will not be weighed provided there is *any* consideration (per Lord Ellenborough in *Phillipps v. Bateman*, 1812, 16 East, at p. 372), that is, any consideration of some value (*Townend v. Toker*, 1866, L. R. 1 Ch. 446, 458; *Cheale v. Kenward*, 1858, 3 De G. & J. 27). At the same time money need not actually pass; for example, where a balance is due on cross accounts, the cross charges are really pecuniary considerations for discharge apart from the balance (*Holland v. Russell*, 1861, 30 L. J. Q. B. 308, 313; *Callander v. Howard*, 1850, 10 C. B. 290; *Credit Co. v. Pott*, 1880, 6 Q. B. D. 295). A pecuniary consideration must, however, be existing, and if it turn out to be past, the contract based on it will be *nudum pactum* (*Eastwood v. Kenyon*, 1840, 11 Ad. & E. 438, 451; *Jeremy v. Goochman*, 1596, Cro. (1) 442). On the other hand, if a tenant holds over after a notice to quit or after the expiration of his lease, and the landlord has had to pay damages to some prospective tenant, there will be a good implied contract to recompense the landlord for such damages (*Bramley v. Chesterton*, 1857, 2 C. B. N. S. 592). As to the kind of payment, if it is good by the law of the country where made, it will be good here (*Ralli v. Dennistown*, 1851, 6 Ex. Rep. 483).

Difficult questions frequently arise where the consideration is not money, but a bill of exchange or promissory note or the like. Generally speaking the acceptance of a document of that description when a debt is due only gives an extended credit, that is, postpones the actual date for payment, so that the creditor, notwithstanding such acceptance, may sue for the original debt (*In re London, Birmingham, and South Staffordshire Bank*, 1865, 34 L. J. Ch. 418; *Sayer v. Wagstaff*, 1844, 5 Beav. 415, 423; *Rumball v. Murray*, 1789, 3 T. R. 298). The presumption, then, will be against the discharge of the debt by such bill or note, and all liens and other remedies will be available to the creditor (*In re London, Birmingham, and South Staffordshire Bank*, 1865, 34 Beav. 332). On the other hand, if there is evidence that the acceptance of the bill or note was to be a discharge, that construction will be enforced, as if the bill or note accepted is payable to a third person, or his order, or to bearer, or by a third person (*Belshaw v. Bush*, 1851, 11 C. B. 191; *Fearn v. Cochrane*, 1847, 4 C. B. 274; *Price v. Price*, 1847, 16 Mee. & W. 232; *James v. Williams*, 1845, 13 Mee. & W. 828; *Simon v. Lloyd*, 1835, 2 C. M. & R. 187). And the same result will follow where the creditor has apparently taken upon himself the risk of the bill or note being met at maturity, or where he is guilty of laches in not duly presenting it or giving notice of its dishonour (*Peacock v. Pursell*, 1863, 14 C. B. N. S. 728; *Caine v. Couston*, 1863, 1 H. & C. 764; *Sard v. Rhodes*, 1836, 1 Mee. & W. 153). So, too, the original debt will be discharged where the creditor on presenting a draft to a banker or drawee has the opportunity of getting cash, but takes a bill or note instead thereof (*Strong v. Hart*, 1827, 6 Barn. & Cress. 160; *Marsh v. Pedder*, 1815, 4 Camp. 257); as also if he receives a cheque and keeps it an unreasonable time before presenting it to the banker, and the latter in the meantime becomes insolvent (*Hopkins v. Ware*, 1869, L. R. 4 Ex. 268; *Chamberlyn v. Delarive*, 1767, 2 Wils. 353; cp. *Poole v. Cabanes*, 1799, 8 T. R. 328).

Bank notes, payable to bearer and transferable on delivery, have always

been considered as money (*Raphael v. Bank of England*, 1855, 17 C. B. 161; *Wright v. Reed*, 1790, 3 T. R. 554; *Miller v. Race*, 1758, 1 Burr. 452), even country bank notes (*Morris v. Wall*, 1798, 1 Bos. & Pul. 208; *Cousins v. Thompson*, 1795, 6 T. R. 335).

The term "pecuniary consideration" does not, however, include the surrender of a life interest in a sum of money and a contingent interest in the corpus, at all events within 53 Geo. III. (1814) c. 141, which replaced the 17 Geo. III. (1777) c. 26 (*Evatt v. Hunt*, 1853, 22 L. J. Q. B. 348; *Blake v. Attersoll*, 1824, 2 Barn. & Cress. 875), or the grant of an annuity charged on land (*James v. James*, 1821, 2 B. & B. 702), or a transfer of stock (*Cumberland v. Kelley*, 1833, 3 Barn. & Adol. 602), or the resigning a situation or giving up of business (*Hutton v. Lewis*, 1794, 5 T. R. 639; *Crespigny v. Wittenoom*, 1792, 4 T. R. 790).

Pecuniary Legacy.—See WILL, *Judicial Glossary*.

Pedigree, Proof of.—The matters which have to be proved to establish a pedigree, are births, deaths, and marriages. Legitimacy or illegitimacy is generally proved, or may be presumed, when the date of the birth and the previous marriage of the parents is proved (see PRESUMPTIONS). But independent evidence may be necessary in cases where the facts to establish the presumption cannot be proved, or to rebut it.

Parol Evidence.—Upon all these facts direct or circumstantial parol evidence may be given (*R. v. Allison*, 1806, Russ. & R. 108; *R. v. Mainwaring*, 1856, Dears. & B. C. C. 132).

Registers.—The above facts may also be proved by certified copies of, or extracts from, registers of birth, baptism, marriage, death, and burial, kept (in this country) in accordance with various statutes, or in accordance with ecclesiastical law. Such certificates prove, in addition to the principal facts, such other particulars, including in nearly all cases the date, as are required by law to be entered in the register (*Wihen v. Law*, 1821, 3 Stark. 63; 23 R. R. 757; *R. v. Clapham*, 1829, 4 Car. & P. 29; *R. v. North Petherton*, 1826, 5 Barn. & Cress. 503; 29 R. R. 305; *Irish Society v. Bishop of Derry*, 1846, 12 Cl. & Fin. 641, per Parke, B., p. 669. As to date in certificate of birth, see *In re Wintle*, 1870, L. R. 9 Eq. 373; and in certificate of baptism, see *Glenister v. Harding*, 1885, 29 Ch. D. 985). Such certificates are receivable in evidence on their mere production (14 & 15 Vict. c. 99, s. 14; *R. v. Weaver*, 1873, L. R. 2 C. C. R. 85; *In re Hall*, 1852, 22 L. J. Ch. 177; *In re Porter's Trusts*, 1856, 25 L. J. Ch. 688; but as regards certificates of baptism, see *Walker v. Beauchamp*, 1834, 6 Car. & P. 552). Evidence must be given to identify the persons named (*R. v. Weaver, supra*; *Parkinson v. Francis*, 1846, 15 Sim. 160).

As to the various registers and their contents, see BIRTHS, REGISTRATION OF; DEATH, REGISTRATION OF; BURIAL; REGISTRAR-GENERAL.

Declarations (q.v.) of deceased persons relating to the matters in question are also admissible in pedigree cases (*Goodright v. Moss*, 1777, 2 Cowp. 591; *Davies v. Lowndes*, 1843, 7 Sco. N. R. 141, 208; *Monkton v. A.-G.*, 1831, 2 Russ. & M. 147).

The declarations must have been made by persons related by consanguinity to the family, though the particular degree of relationship need not be proved. Declarations by a husband as to his wife's family and legitimacy, and by a wife as to those of her husband, are also admissible,

but not those of servants (*Davies v. Lowndes*, *supra*; *Shrewsbury Peerage* case, 1858, 7 H. L. 1; *Johnson v. Lawson*, 1824, 2 Bing. 86; 27 R. R. 558; 9 Moo. 183; *Vowles v. Young*, 1806, 13 Ves. 140; 9 R. R. 154). Illegitimate relationship is not enough (*Doe v. Barton*, 1827, 2 Macl. & R. 28; *Crispin v. Doglioni*, 1863, 3 Sw. & Tr. 44).

But a parent's declarations as to the child's birth and illegitimacy are admissible (*In re Thompson*, 1887, 12 P. D. 100; *Murray v. Milner*, 1879, 12 Ch. D. 849); as also are the declarations of a deceased person as to his own legitimacy (*In re Perton*, 1885, 53 L. T. 707).

The declaration must have been made *ante litem motam*, but may have been made for the express purpose of proving pedigree (*Berkeley Peerage* case, 1811, 4 Camp. 401; 14 R. R. 782; *Lovat Peerage* case, 1885, 10 App. Cas. 763; *Shedden v. Patrick*, 1860, 2 Sw. & Tr. 170; *Butler v. Mountgarret*, 1859, 7 H. L. 633; *Dysart Peerage* case, 1881, 6 App. Cas. 489, 507; *Doe v. Davies*, 1847, 10 Q. B. 315).

The declarations may be in any form: letters, oral statements, entries in family Bibles, recitals and descriptions in deeds and wills, inscriptions on tombstones, rings, etc. (*Berkeley Peerage* case, *supra*; *Goodright v. Moss*, *supra*; *Slaney v. Ward*, 1836, 1 Myl. & Cr. 355; 7 Sim. 595; *Monkton v. A.-G.*, *supra*; *Vulliamy v. Huskisson*, 1838, 3 Y. & C. 80; *De Roos Peerage* case, 1803, 2 Coop. 542; *Glenister v. Harding*, 1885, 29 Ch. D. 985; *Vowles v. Young*, *supra*; *Hubbard v. Lees*, 1866, L. R. 1 Ex. 255).

They may themselves be founded, not on the declarant's personal knowledge, but on family tradition and reputation (*Doe v. Griffin*, 1812, 15 East, 293; 13 R. R. 474; *Monkton v. A.-G.*, *supra*; *In re Perton*, *supra*).

To prove marriage, evidence of general reputation is admissible (*Lyle v. Ellwood*, 1874, L. R. 19 Eq. 98; *Murray v. Martin*, *supra*; *Doe v. Fleming*, 1827, 4 Bing. 266; 29 R. R. 562; *Evans v. Morgan*, 1832, 2 Car. & Jer. 453; *Limerick v. Limerick*, 1863, 4 Sw. & Tr. 252), also evidence of the conduct of the parties towards each other; and declarations made by the parties may be admissible even during the lives of the declarants as part of such conduct, part of the *res gestæ* (*R. v. Wilson*, 1862, 3 F. & F. 119; *Woodgate v. Potts*, 1847, 2 Car. & Kir. 457; *De Thoren v. A.-G.*, 1876, 1 App. Cas. 686. And see *The Aylesford Peerage* case, 1885, 11 App. Cas. 1—letters of the mother admissible on a question of legitimacy as part of the *res gestæ*). The falsification of pedigrees is punishable under 22 & 23 Vict. c. 35, s. 24.

Pedlars.—See HAWKERS AND PEDLARS.

Peel Acts.—See ECCLESIASTICAL COMMISSIONERS, vol. iv. at p. 381.

County Courts.—The Annual County Courts Practice; containing the Jurisdiction and Practice under the County Courts Act, the Bills of Exchange Act, and the Employers' Liability Act, and the Statutes and Rules of Practice. By His Honour Judge SMYLY. 2 vols. 25s.

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